Tagore Law Lectures—1886.

THE LAW

RELATING TO THE

TRANSFER OF IMMOVEABLE PROPERTY,

INTER VIVOS.

WITH AN APPENDIX

CONTAINING

THE TRANSFER OF PROPERTY ACT, BEING ACT IV OF 1882.

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BY

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BACHELOR-IN-LAW,

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CORRIGENDA.

Page 2 line 8 *for* 'aw' *read* 'law'
,, 11 ,, 18 ,, 'were' *read* 'was.'
,, 21 ,, 2 ,, 'in the countries' *read* 'on the continent.'
,, 22 lines 8 and 9 *for* "previously embraced" *read* "embraced"
,, 30 line 16 *for* "degees" *read* "degrees."
,, 35 ,, 9 ,, "1676" *read* "1696."
,, 35 note 2 ,, "305" *read* "272."
,, 44 ,, 10 ,, 'allowed' *read* 'altered.'
,, 44 line 8 ,, 'in' *read* 'is'
,, 68 ,, 32 ,, 'flowed' *read* 'flowed.'
,, 78 contents, line 3 *for* 'soil' *read* 'seed.'
,, 95 ,, 14 ,, '*interdictum*' *read* '*interdictum*.'
,, 105 line 32 *for* '*primâ*,' *read* '*primâ facie*.'
,, 107 note, line 2 *for* 'company' *read* 'commission.'
,, 109 line 17 *for* '*emphytenta*' *read* '*emphyteuta*.'
,, 112 ,, 18 ,, 'fendant' *read* 'defendant.'
,, 120 ,, 22 ,, 'भूक्तिः' *read* 'भुक्तिः'
,, 130 note, line 1 *for* 'भूक्ते' *read* 'भुङ्क्ते'
,, 137 line 5 ,, 'contracy' *read* 'contrary.'
,, 138 contents, line 15 *for* 'voirdable' *read* 'voidable.'
,, 144 note, line 8 *for* 'आषोड़शाद्वषात्' *read* 'आषोड़शाद्वर्षात्.
,, 145 line 32 *for* 'age eighteen' *read* 'age of eighteen.'
,, 148 ,, 31 ,, 'stil' *read* 'still.'
,, 154 ,, 15 ,, 'whon' *read* 'whom.'
,, 154 ,, 28 ,, 'clients' *read* 'client's.'
,, 159 ,, 22 ,, 'British India' *read* 'British Indian.'
,, 161 ,, 26 ,, 'question' *read* 'questions.'
,, 163 contents, line 1 *for* '*Kattyaum*' *read* '*Kattyayana*.'
,, 163 ,, 33 ,, 'Administrative' *read* 'Administration'
,, 163 line 1 *for* 'अस्वामिविक्रयं' *read* 'अस्वामिविक्रयं'
,, 168 lines 37 and 38 *for* 'Transfer of Property' *read* 'Transfer of Property Act'
,, 170 line 20 *for* 'reversiner' *read* 'reversioner'
,, 176 ,, 21 ,, 'strauge' *read* 'strange.'
,, 177 ,, 1 ,, 'rable' *read* 'red'
,, 178 ,, 27 ,, 'appears' *read* 'appear'
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,, 181 ,, 30 ,, 'sanction' *read* 'sanction.'
,, 184 ,, 2 ,, 'power' *read* 'powers'
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,, 241 contents, line 23 *for* 'doctrine by' *read* 'doctrine of.'
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,, 251 line 6 *for* 'means' *read* 'mean'
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,, 320 ,, 34 ,, 'trustees' *read* 'trustee.'
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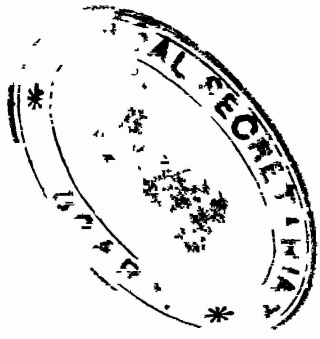
,, 351 ,, 10 ,, 'pawnee' *read* 'pawnor'
,, 378 ,, 29 ,, 'contract' *read* 'contrast'
,, 400 ,, 22 ,, 'title' *read* 'little.'
,, 404 ,, 31 ,, 'succession' *read* 'accession.'



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THE LAW

RELATING TO THE

TRANSFER OF IMMOVEABLE PROPERTY.

LECTURE I.

GENERAL VIEW OF PROPERTY, FAMILY AND LAW.

The title—Property, Family and Law—Origin of the conception of law—The two forces or desires—Communism, its modifications—Guizot on Great Men—The Code of Manu, its character and value—The origin of ancestor-worship—The Householder—The Sacred Fire—Marriage—Woman's position in ancient society—Adoption—M. De Coulanges on Family—Seizure as a mode of acquisition—Griha and Domus, compared—Turn of worship, significance of—Agnatic Kinship, basis of—The identity of Law and Religion in ancient times—Jus and Dharma, explained—Ulpian's definition of law—Modern notion of law as compared with the ancient—The development of early Roman society—The Patricians and the Plebeians—The ascendency of Political over Religious ideas in Rome—The absorption of religion in Wealth and Power—Cæsar, the Pontifex—Citizenship, its exclusiveness—Nero and the Judges of Achaia—Law, the will of the Emperor—Justinian, Hobbes, and Austin—The Barbarians in Europe—Brahmanic society, its development—Woman's position—Sir Henry S. Maine, his strange notion as to the origin of Suttee—Custom as a source of Brahmanic Law—The Mussulman system—The British-Indian system—The study of law, its difficulties.

The title of the present course of Lectures is the Law relating to the Transfer of Immoveable Property *inter vivos*. In archaic society, Property and Family were inseparable terms, and both owed their origin to a kind of religion which ultimately gave birth to law. Property, Family and Law are thus kindred terms, and a general consideration of their nature and mutual dependence will properly form the first topic of our discourse.

The word, law, like its Latin equivalent, *lex*, has contracted a variety of meanings; but there runs through them all, more or less transparently, the notion of desire or affinity, not unfrequently expressed as power or force. The order and uniformity of nature are ascribable upon every known theory of religion to the expression of Divine will. The Bard in the Rig-Veda,[1] the oldest record yet known of what is called the Aryan family of nations, beholds

[1] "As long as man continues to take an interest in the history of his race, and as long as we collect in libraries and museums the relics of former ages, the first place in that long row of books which contains the records of the Aryan branch of mankind will belong for ever to the Rigveda." Max Muller, His. of Ancient Sanscrit Literature, p. 63.

order arise out of chaos under the influence of desire (कामः).[1] The same idea of love or desire as the origin of things forms the basis of the Epicurean poem of Lucretius,[2] and even recurs in the austere literature of the Arabian creed, so beautifully embellished by the Soofi hand of Urfi.[3] The primitive thinker, meditating on his own actions as the result of his own desires, naturally turned to desire as the cause of the universe. This supernatural origin of law gradually gave way before a knowledge of the more immediate relations of things, and aw in the writings of Montesquieu and Locke[4] is defined as a necessary relationship. Schooled in the doctrine of Hobbes, Austin, a name familiar to you, repudiated this extensive signification of the term, and reverting somewhat to the older conception, restricted its use to the intimation of the will of a rational being which other rational beings are all but powerless to resist. That relation which arises from fear is, according to Austin, the true ingredient of law,[5] and thus the law of the solar system, in Austin's classification, becomes law merely in name or by a figure of speech. But in whatever sense the term, law, may be used, it is clear that human actions proceed from human desires, which it is the end and object of society to control, and the history of human laws is in the main the history of the restraints placed upon human desires. The two forces that have been known to exercise their earliest and most powerful influence on man are—the craving for food, and the craving for offspring. The one brings us in contact with the external world, the produce of the earth, the air and the sea; the other draws us towards our own species, and is the ultimate source of the relationship of husband and wife, parent and child. The operation of these forces furnishes us with the first crude germ of the law of human actions; but these are absolutely self-seeking instincts, and many circumstances must combine before anything like a society can be established where one man is seen to be regardful of the interests of another. In the process of development much has to be credited to the gregarious instinct of man, and much to the silent influence of mind over mind; until one arrives at a stage of social existence where the more powerful or the more intelligent members of a community, in accordance with their own ideas of self-interest or general utility, compel the rest to pursue in all essential matters a definite line of conduct by appealing to their desire of happiness or their fear of evil. Ancient records and modern works of travel are unanimous in their testimony that man cannot live alone. The researches

[1] नासदासीन्नो सदासीत् * * कामस्तदग्रे = Nor aught nor naught existed * * first came love upon it. M. 10, S. 129.

[2] De Rerum Natura, Lib. 1. v. 2—37.

[3] Qasida 1. Cf. 1 Ep. St. John, C. 4, v. 8.

[4] L'Esprit De Lois Lib. 1, c. 1. Human Understanding, 2, c. 28.

[5] *Cf.* Manu, C. 7, v. 15.

of antiquarians, and the numerous pictures that are presented to us of savage life, reveal man as member of a group. In spite of the notorious quarrelsomeness of their disposition, primitive men, in the present as in the past, are within their respective groups found to dwell with each other in comparative peace, sharing in common whatever objects there may be of enjoyment; but beyond the narrow circle there is one continuous scene of violence and rapine; for as, on the one hand, we read of the rape of the Sabine women by Romulus and his crew, and the occasional raids of savage tribes on their neighbours in quest of food and females, so, on the other, we are told how the plundering Arab was singularly hospitable at home; and even the sordid Esquimaux seem to participate with their own, and steal from a neighbouring, tribe.[1]

The tendency to communism is so rooted in the human race that groups or communities may be said throughout the whole range of history to have been held together, more or less closely, by the aptitude among the members to secure themselves against invasion from without, and to share in common what in each age are esteemed to be the necessaries of existence. The refusal on the part of those that have to share with those that want has ever been the signal of strife and contention. To it may be ascribed the cause of many a conquest and the origin of many a domestic trouble. "We know," remarks Hallam with a commendable sense of national indignity, "how long the outlaws of Sherwood lived in tradition—men who, like some of their betters, have been permitted to redeem by a few acts of generosity the just ignominy of extensive crimes. These indeed were the heroes of vulgar applause; but when such a judge as Sir John Fortescue could exult that more Englishmen were hanged for robbery in one year than French in seven, and that if an Englishman be poor and see another have riches which may be taken from him by might, he will not spare to do so, it may be perceived how thoroughly the sentiment had pervaded the public mind."[2] This innate characteristic of man's nature becomes all the more apparent when a tribe or part of a tribe seeks a settlement for itself elsewhere, and gradually raises a sort of communistic wall between itself and the outlying race; and a series of conflicts is the usual result, leading perhaps to disastrous revolutions. To the student of history, France and Ireland will furnish ample illustrations.[3]

The accounts given of some Oceanian aborigines by a modern traveller,[4] though somewhat marred by the use of ambiguous language which is not uncommon among observers of habits and customs alien to their own, tend to show that tribal communism was perhaps the primitive type of anything

[1] Lubbock's His. Civ.; Sale's Koran, Introd.

[2] 3, Middle Ages, 168.

[3] Hazlitt's His. of Fr.; Rev. Reid's His. of Irish Presbyt.

[4] Lubbock's Pre-historic Man, App.

approximating to a settled form of life. The aversion, which, with their notorious freedom of behaviour in relation to all the men of their own tribe, the females of one Australian group are accustomed to show towards the males of another, may not inaptly be compared to the anxiety of Boadicea, the Queen of the Iceni, to preserve the honour of her daughters from the hands of the Romans. The next step, it would seem, was towards the breaking up of one group into smaller knots, all acknowledging a sort of irregular allegiance to the elders or heads of the tribes as among the ancient Britons. In a document not much less old than two thousand years, familar to us as the Commentaries of Cæsar, there occurs this passage in a description of the natives of Britain: "Uxores habent deni duodenique inter se communes, et maxime fratres cum fratribus, parentesque cum liberis; sed, si qui sunt ex his nati, quorum (ejus ?) habentur liberi, quo primum virgo quæque deducta est."[1] The concluding observation, that if there was any offspring of such confused alliance, it was deemed to be the child of him who first knew the mother as a virgin, points to the conclusion that the community had begun to entertain more abiding ideas of life, and temporary connections were making room for more permanent relationships. Lingering traits of kindred customs are also discernible in the Sanscrit epics. The legend of Uddánaka and Shétakétu in the Mahábhárata meets with its counterpart in the practices of the Greenland Esquimaux, and is reconcilable with, perhaps, a less gross custom among some American aborigines by which any man may help himself to his neighbour's store upon need.[2]

In the archaic state of existence, where equality is pretty nearly the rule, the influence of superior minds would count for little and was not likely to be felt; but as man begins to lift himself more and more from the smaller wants and needs of the hour to the larger demands of the future, the inequality of his nature[3] begins to show a marked development, which in the early times is likely to be intensified by the segregation of groups.

The deep-seated instincts of man's nature urge him to have, acquire and propagate; but as, on the one hand, these forces are the origin of human actions and the incipient factors in the formation of society; so, on the other, it has been the aim and object of the highest intelligence of a growing society to restrain them within due bounds, for by such restraints is the sphere of society gradually extended, and the small groups themselves preserved from extinction. The rude man seizes and captures, whether it be the bride whom he desires, or the food which he covets, nor is he likely to be troubled with the scruples of discrimination. On referring, however, to some of the writings handed down to us

[1] Cæsar. Lib. 5, C. 14.

[2] Lubbock's His. Civ.

[3] Argyll's Reign of Law, 377.

by antiquity, one alights upon a work known as the Institutes of Manu. Verse after verse in that remarkable volume is taken up with elaborate rules on diet.[1] We are told with the most searching minuteness of the sort of food which it is the duty of mankind to eschew, and equal prominence is given, on the one hand, to chastity and the observances of married life, and, on the other, to the institution of property and the unexceptionable modes of acquisition.[2] Howsoever remote may be the antiquity of Manu, the social change which is associated with his name must have been at work during a period long anterior to his time. The rude communism depicted by Cæsar and the Australian travellers would undoubtedly have to pass through numerous phases, and numberless Manus must have come and gone, before society could have attained a point which is the extreme antipodes of savage life. Nor is it possible to conceive of a stronger protest against communism than is to be met with in some of the passages in Manu. The process of social evolution has exercised the minds of many, and some have even attributed the result to the direct interference of Providence as exhibited by the advent of great men. Guizot explains one of the causes of civilization in these words :—" There was a fourth cause of civilization, a cause which it is impossible fitly to appreciate, but which is not therefore the less real, and this is the appearance of great men. No one can say why a great man appears at a certain epoch, and what he adds to the development of the world; that is a secret of Providence; but the fact is not, therefore, the less certain. There are men whom the spectacle of anarchy and social stagnation strikes and revolts, who are intellectually shocked therewith as with a fact *which ought not to exist*, and are possessed with an unconquerable desire of changing it, a desire of giving some rule, somewhat of the general, regular and permanent to the world before them."[3] If there are a few such men who have actually shone forth before the world, there are many that have laboured noiselessly, and so gone to their rest. It is, indeed, difficult to over-estimate the services which the silent workers of slow revolution have rendered to their country. Some idea may be formed of the men by the contemplation in a later age of the grandeur of character and the genius of devotion of the Founder of Vaishnavism.

Now, the Code of Manu gives the direct and the most unmistakable evidence of the gradual development of the rules of social life; so much so, that some of the verses are entirely out of harmony with the others. All through the volume, the names of the older sages are invoked with adoration, and their authorities cited with profound respect. Nevertheless, there are not wanting instances where these venerable authorities are sometimes nervously departed from, and at others unequivocally contradicted. The Code may not altogether in-

[1] Manu, C. 5.

[2] C. 4, v. 3, 134, 176, C. 10, v. 115.

[3] His. de la Civ., 84.

aptly be described as a synopsis of all the traditions, customs and observances, that had from time immemorial come down with periodic accretions to the age of Manu. Sage after sage came and went, leaving behind them traditions which after a succession of ages formed ultimately the basis of a full grown society. Rishis, or sages, or great men—their work may not inappropriately be compared to the labours of those wonderful little animals which have beset with snares the path of the navigator, and unveiled one more chapter of romance to the student of Geology. As, on the one hand, rules are to be met with in the Code which inculcate free intermarriage without distinction of classes,[1] so there are precepts, on the other, some of which timidly reprove,[2] while others boldly reprobate this species of alliance.[3] One couplet enumerates seizure as a form of marriage,[4] whereas another points to the turpitude of such a union.[5] If there is a text, which bears the sanction of an ancient sage for the use of "excellent sort" of flesh meat,[6] there are others which absolutely prohibit that article of food.[7] Passages are by no means scanty which maintain the inviolability of the person of a Brahman; but at the same time there is a text which undoubtedly permits the destruction even of one endowed with divine knowledge and wisdom in order to protect oneself from deadly violence.[8] There is a text, it is true, which appears to impose lifelong servitude on a Sudra;[9] but there are also texts which are as distinct in their utterance that a Sudra by close contact with learned Brahmans may be raised to exalted position and dignity.[10] While certain texts dwell upon the pre-eminence of the eldest brother, who in respect of his juniors should occupy the place of the father, and exercise parental power;[11] there are others which commend the practice of separation and partition.[12] In one part of the Code, the son is reduced to the condition of a mere slave and acquires nothing but for the use of the father,[13] whereas in another, a son is enjoined not to neglect his father and mother in their distress.[14] If there are passages which some critics have not hesitated to reproach for the sanguinary character of

[1] C. 3, v. 12, 13, 43-44.
[2] C. 3, v. 13, 14, 15, 155.
[3] C. 3, v. 18, 19.
[4] C. 3, v. 23.
[5] C. 3, v. 41.
[6] C. 5, v. 22.
[7] C. 5, v. 38, 46, 48, 51, 54, 54, 55.
[8] C. 8, v. 350.
[9] C. 8, v. 414.
[10] C. 8, v. 23—24, C. 10 v. 42, 64, 65, 67, 127, 128.
[11] C. 4, v. 184, C. 9 v. 105.
[12] C. 9, v. 111.
[13] C. 8, v. 416.
[14] C. 8, v. 389.

their penal sanctions, there are passages too without number which for benevolence and clemency, must challenge the admiration of all men.[1] Nor can one help observing that rules of tortures and torments sometimes find a strange place by the side of the most lenient measures of punishment.[2] It is needless to proceed to any further comparisons; but I desire to draw your attention to a passage which seems to be in striking accord with the outcome of the highest intelligence of modern Europe:—"Having conquered a country," thus runs the text, "let him (the king) respect the deities adored in it, and their virtuous priests; let him also distribute largesses to the people, and cause a full exemption from terror to be loudly proclaimed. When he has perfectly ascertained the conduct and intention of all the vanquished, let him fix in that country a prince of the royal race and give him precise instructions. Let him establish the laws of the conquered nation as declared in their books, and let him gratify the new prince with gems and other precious gifts."[3] The question naturally arises, *viz.*, are these incongruities and contradictions, these "inelegantiæ juris," to borrow the language of the Romans, the result of the cloud-weaving fantasy of a Brahman recluse, something after the ideal Republic of Plato, as the celebrated author of Ancient Law[4] has somewhat hastily assumed, or are they the record of the actual observances of a changeful society? The problem is not difficult of solution if one would only bear in mind that in early times the habits and customs of a former age were held to be unalterable, and men clung to them with much more tenacity than that with which modern lawyers are sometimes found to adhere to the precedents of a by-gone generation. It is a recognized principle of English jurisprudence that no written law can be abrogated by disuse, and a striking illustration of the application of this rule occured in the case of *Ashford* v. *Thornton*, in 1818, when the Court of King's Bench in an appeal of death sustained "trial by battel."[5] In every community, a deviation from old ways and manners is seldom regarded without feelings of uneasiness, and one cannot be surprised if such was also the sentiment in ancient times. "To walk in the path of one's ancestors"[6] was in ancient times considered to be the highest virtue, and he must have been a very great man, indeed, who could have had the hardihood to reject without ceremony a custom which had once been established. To modify pre-ordained rules of life by way of substitution had not yet entered men's minds; and slowly and timidly as that work was carried

[1] C. 2, v. 177, C. 3 v. 112, 113, 14, C. 4 v. 246, C. 10 v. 63, &c.

[2] C. 8, v. 129, 320.

[3] Manu, C. 7, v. 201—203.

[4] Maine's Ancient Law, 18.

[5] 1 Barn and Ald, 456.

[6] Manu, C. 4, v. 178. *Cf.* The first law laid down by Draco in Athens:—"Adhere to the rites followed by the ancestors." La Cité Antique, 37.

on, it was accomplished by the process of suffixion or addition much after the manner of the early Roman Prætors. Manu's Code is a faithful picture, without much regard to logical arrangement, of the customs and practices which were step by step introduced into the community by the agency of great minds, and if there are occasional gaps in the work, partly attributable to the depredation of time, and partly in an age of traditions to the slipperiness of men's memory, there are records of customs, notably the custom of levirate, which are complete from beginning to end. We are told, for instance, how king Vena in a weak moment permitted irregular alliances, how there emanated from them the practice of marriage with a brother's widow, how time imposed restraints upon that practice, and how in the end it fell into disuse and deserved the reproach of the twice-born classes.[1] It will thus be readily seen that in order to obtain a tolerably correct idea of the age in which the Code was actually compiled much has to be retrenched. The Code contains many customs which must have lost all vitality at the period of its compilation. The Chapter on punishments presents strong indications of an extremely rude age, which is wholly out of keeping with the spirit of tenderness towards domestic animals and the brute creation which breathes through the bulk of the volume. These enactments must have come into operation not much after the Aryans came into collision with the *Krishnas* (the Blacks) of the Rigveda, and whoever is at all acquainted with the history of criminal jurisprudence must know that penal law is the only important law at the foundation of society[2]—and it is not until the lapse of many years that the rigour of punishments is relaxed. The real value of the Code, however, consists in the insight which it affords us into the past, and our concern is not so much with the modern as with the antiquated and obsolete portion of the *Sanhitas* or the Collections. The points which especially interest us are the condition of the householder (Grihastha), the sacramental fire (Gárhapatya), the perpetual pupilage of women, and the scrupulous regard for the dead. In the communal tribes, it will be perceived, the objects of enjoyment themselves belong to none; but the use of them to all. Everything is fugitive and nothing permanent. In course of time there spring up within the tribe more or less solidified groups. Less incongruous relationships are established between the sexes, and what had formerly belonged to all or none, come to belong at least to some. The sentiment that this woman is my wife, she belongs to me, no one else has any right to her, is one of much later growth, and is at once the foundation-stone of a family association and the origin of property. To mark the transition, or determine the connecting link between

[1] C. 9, v. 64, 65, 66.

[2] Will, Real Prop., 4 and 5. "The rules of the Salic code principally relate to the punishment or compensation of crimes; and the same will be found in our earliest Anglo-Saxon laws." 1 Hallam's Middle Ages, 280.

extravagant communism, on the one hand, and the stringent rules of exclusive possession, on the other, is the real question. To quote the words of Professor Leslie, in his Introduction to M. de Laveleye's Primitive Property, "what requires explanation is not the want or desire of certain things on the part of individuals, but the fact that other individuals with similar wants and desires should leave them in undisturbed possession, or allot to them a share of such things. The mere desire for particular articles, so far from accounting for settled and peaceful ownership, tends in the opposite direction, *viz.*, to conflict and the right of the strongest."

We will find that the principle of ancestor-worship, by repelling one individual from another, brought about among the oldest nations of the world the formation of those domestic associations which, when undisturbed by invasion or external influence, are still found to be the holders of landed property in some parts of the modern world.

The desire to guard a woman and appropriate her—which, doubtless, gave rise to the hard and fast rules of marriage—has ultimately to be traced to the belief so common among many savages that the dead stand as much in need of subsistence as the living. The rude man hungers for food; in quest of it he roams the live-long day, and his insatiable appetite unappeased by death seems to pursue him even beyond the grave. Food and drink are placed by the side of the beloved corpse; and later on, his horses and slaves, his treasures and equipage, and even a whole harem of women are buried with the deceased. "Omniaque, quæ vivis cordi fuisse arbitrantur, in ignem inferunt" is the information which Cæsar gives us of the aborigines of Gaul.[1] The task of providing for the dead man might have originally devolved upon them that were nearest to him; but as the belief in the necessity for future subsistence gained more ground, men became all the more anxious that there should be left some one who for certainty would maintain them after death, and, in an unquiet age, should, for obvious reasons, be a male person. The ancient Arabs gave the inheritance to male relations, and specially to those who were capable of bearing arms, and, indeed, the birth of a daughter was conceived to be a misfortune.[2] Men in those days failed to see the strong barrier which subsequent ages have imposed between this world and the next. The future state was as real to them as the present, and they were as much concerned with the happiness of the life to come as with the happiness of the life they actually lived. This idea ere long ripened into a religion or *culte*, and what before used to be mere gifts to the dead was gradually invested with

[1] Lib. VI, C. 19.

[2] Elles attribuaient donc l'héredité aux parents mâles, et specialement à ceux qui étaient aptes à porter les armes. Les filles—leur naissance etait considérée comme un malheur. Sautayra, Tome II, 98.

a kind of sanctity, and assumed the character of an inviolable duty towards the *Manes*. In order firmly to secure periodical offerings after death, there was early felt the want of a male offspring or begotten son, than whom no mortal could be nearer to a man. This extreme anxiety for a son shows itself in the Code of Manu in the form of a tender regard for the first-born, who alone is described as the inheritor and the transmitter of the domestic rites, the other sons filling the position of mere subordinates and dependants, whose very birth is attributed to the instinct of nature rather than the commands of religion.[1] "To preserve the purity of a woman so that the child may be one's own"[2] was the very first injunction to a householder in olden times, and in order to ensure the true paternity of the son, the perpetual pupilage of women followed as a necessary corollary. The *Sanhitas* and the Twelve Tables furnish equal evidence. The one tells us that a woman ought never to be independent (न स्त्री स्वातन्त्र्यमर्हति)[3] and should remain continually under guardianship, whether of the father, the husband or the son; the other warns us that a woman *propter animi levitatem*, must always be held under tutelage.[4] With marriage came the establishment of the sacred fire. When one considers the difficulty with which some savage tribes have been known to kindle fire, and the great care taken by them to keep it alive, one cannot wonder at the anxiety of the ancients for the preservation of the domestic hearth. The Peruvians and the ancient Germans were all fire-worshippers.[5] Dupuis, indeed, endeavours to show that the Christian Messiah is but the incarnation of the sun.[6] To the Bráhmans *Agni* was the first among gods, and the Greeks and the Romans equally acknowledged the divinity of fire. To marry and to kindle the domestic fire were in the past understood to be one and the same thing, as being the common symbol of settled or family life. The Institutes of Manu are loud in the praise of one who has married and become a householder.[7] The first duty imposed upon the father or house-holder is the daily performance of all the domestic religious rites before the fire—the essential part of which consisted in the offerings of boiled rice, milk and fruit to the departed ancestors. The spirits of the ancestors were supposed to be actually present beside the altar in order to partake of the repast. Thus, the domestic hearth was not merely an object of interest to one single individual, but was a common object of interest with the whole family—the dead, the living, and the unborn alike. The *Pitris* and the *Agni* alike wanted sub-

[1] Manu, C. 9, v. 107.
[2] Manu, C. 9, vv. 6, 7.
[3] Manu C. 9, v. 3.
[4] Gai., *Instit*, comm. 144, 145, 155, 157. Also, Ortolan, His. of Roman Law.
[5] Prescott's His. of Peru. Cæsar, Lib. VI, c. 21.
[6] L'Origine De Tous Les Cultes, L. IX:—"le soleil adoré sous le nom de Christ."
[7] Manu, C. III, v. 78.

sistence,[1] and were consequently interested in the perpetuation of the family. Listen to the prayer of Orestes in one of the celebrated dramas of Æschylus:—"Oh, my father, if I live, thou shalt receive rich banquets, but if I die thou shalt go without thy share of savoury repasts with which the dead are nourished."[2] The custom of *parentare*, or the feast of the dead, was well-known to Virgil to which he makes several allusions in the Æneid.[3] Under the circumstances, it is by no means singular that the house with the soil appertaining to it was consecrated to the hearth, and through the hearth to the ancestors and their progeny, both living and unborn, to whom the hearth and the ancestors were equally dependant for support. Each family had its own *Agni* and its own household divinity, which were carefully preserved from the sight of outsiders. Mention is made in Leviticus how Jehovah was offended by oblations made by his people to strange fire.[4] The discordant use of the Latin word "sacer" is apparently a remnant of the old idea that the domestic fire with the soil attached to it was a thing set apart. It was sacred to the members of the particular family, but to all else it was accursed or unholy. The injunction that every householder should have his own private fire led to this result—that all outside a particular family group were looked upon as strange and profane ground. The cumbrous ceremonies of a Brahmanic marriage, and the expiatory rites performed before the fire on entering a newly purchased house accompanied with an invocation to the Manes, still bear witness to the fact. No one, says Manu, must marry within his own *gotra*. The meaning of which is, that those whose male ancestors had ever participated in the same household fire cannot intermarry. The consequence of it was, that the females born in one *gotra* had to be disposed of in marriage to aliens. Two of the essential ceremonies of a Brahmanic marriage are—the gift of the bride by the father or his representative in the presence of the household deity, and the initiation of the bride in the bridegroom's house before the domestic fire. These formalities tend to show that the bride is deemed to be a perfect stranger, that she had hitherto been the property of her father, that the household deities have to be propitiated for the introduction of an alien, and invoked as witnesses to the deed. The corresponding nuptial rites of the old Greeks and Romans were the ἐγγύησις or *traditio*, and the τέλιος or *confarreatio*.[5] No wonder that in ancient times the marriage tie should be regarded as indissoluble.[6] On marriage the wife became a part and parcel of the husband, and not even death could dissolve the allegi-

[1] Manu, C. III, v. 274. C. IV, v. 28.
[2] Choeph, 482-484. La Cité Antique, 14.
[3] Lib. III, 301. Lib. V, 77, 81. Lib. VI, 380.
[4] Levit, C. X. v. 2.
[5] La Cité Antique, 43.
[6] Manu, C. 9, v. 101.

ance which she owed to her lord.[1] With the Romans, second marriages among women were held in abomination, and even in later times those who had been married but to one husband (univira), or who remained in widowhood, became the objects of special regard.[2] The ancient Germans prohibited second marriages by law,[3] and among the Hebrews the priestly class at least were forbidden to wed any but virgins.[4]

To the woman marriage was a second birth, and by it alone she acquired a status. It was, however, as a mother, or rather as the genetrix of male children that she possessed any real value. The oath which the Romans had to take before the Censor was in this form :—"Uxorem se liberûm quærendorum gratiâ habiturum."[5] The celebrated precept of Chánakya that a wife is necessary for the sake of a son bears the same testimony (पुत्रार्थं क्रियते भार्य्या). In an age when second marriage,[6] even on the part of the man, if not absolutely forbidden, was regarded with detestation, the husband was enjoined to supersede a wife by whom female children only had been brought forth.[7] The Roman maxim that the woman is at once the beginning and end of her family (mulier familiæ suæ et caput et finis est)[8] throws some light on the primitive position of women, and may be thus rendered into the Brahmanic mode of expression, *viz.*, that a woman, whilst incapable of perpetuating her father's *gotra*, or family stem, may be the prolific source of increase to the *gotra* of her husband. It was an old Arabian custom that the daughter ceased on her marriage to form part of her natural family.[9] In the Mithila school of what is called the Hindu Law, the daughter's son, as if with a touch of irony, is consigned a place in the order of succession after the king, and since the latter is always present, the practical exclusion of the daughter's son is the obvious meaning.[10] Indeed, so rooted was the idea of the uselessness of the daughter in her father's household, that in spite of the strenuous efforts of natural affection, the daughter's claim to the inheritance has been reluctantly and partially recognized by the later jurists. She succeeds, it is true, to the estate of her father; but not, as is also the case in Rabbinnical law,[11] until the son's male lineage is virtually extinct, and even then she takes as the

[1] Manu, C. 5, v. 156.

[2] Val. Max. 1, 8, 4. Serv, on Virg. Æn. IV. 19.

[3] Tacit. De Mor. Germ. 19.

[4] Levit, C. XXI, vv. 13, 14.

[5] Val. Max. II. 1, 4. Gell. IV, 3.

[6] Manu C. 5, v. 168. C. 11, v. 5.

[7] Ibid. C. 9, v, 81.

[8] Dig. 50, 16.

[9] Sautayra, Tome II. 98 :—"Elles (les filles) cessaient à leur mariage de faire partie de la famille naturelle."

[10] Vyavasthá Darpana, Sanscrit Edition, 2nd, p. 262.

[11] Sautayra, Tome II, 598.

mother or would-be mother of a son, and only for her life. And the daughter's grandson is not only never an heir, but his very kinship is denied: whereas the male descendant of the seventh ancestor in the male line is comparatively a near and dear relation. A daughter is in your *gotra* so long as she is a maid; but, the moment she is married, she becomes attached to a different hearth and *gotra*, and on your death goes into mourning for a brief space of four days, while your grandfather's brother's great-grandson laments your loss for the full scriptural period, like your own son; a daughter's son performing, if at all, a nominal rite. But, of all the existing institutions of the Brahmanic race, that which is likely to strike one most is the incident of adoption, whereby the offspring of one's own loins is absolutely cut off from his natural family, and engrafted on the household of a perfect stranger, with nothing to remind him of the tie of blood except the prohibited degrees of marriage inherent to consanguinity.

In the midst of a new order of things which has been rapidly developing itself in this country, these institutions, founded on the worship of the hearth and the ancestors, have since acquired more than usual prominence, and forced themselves upon the attention of foreign observers. Sir Henry Maine in his well-known work on Ancient Law has not cared to elucidate that essential phenomenon of primitive civilization which in its last stage of decay still constitutes the fundamental basis of Brahmanic society. Evidence crowds upon us from all sides that whether in Greece, Rome or India the tendency to settled life culminated in religious belief, the worship of the hearth and the ancestors. Therefore, the proposition that in the East the ruling aristocracies *became* religious rather than political or military is liable to misconception.[1] The truth is that in Rome religion early became aristocratic, or an instrument of political power, whereas in India the same element, by repressing the old aggressive spirit, which is inherent in man's nature, rendered itself more and more popular, and ultimately coalesced in a great measure with learning and self-abnegation rather than with wealth. "That which unites the members of a family in ancient times," observes M. Fustel de Coulanges, "is something more powerful than birth, sentiment or physical force, it is the religion of the hearth and the ancestors."[2] To speculate as to how men first came to squat on a determined spot of ground would be a fruitless speculation. It is possible that, on the theory of the selection of species, the ablest might by dint of force have seized upon a plot of land, and defended it by prowess against the inroads of others, or it may well be that fixed settlements did not come into existence till men had learnt

[1] Ancient Law, 11.

[2] "Ce qui unit les membres de la famille antique, c'est quelque chose de plus puissant que la naissance, que le sentiment, que la force physique, c'est la religion du foyer et des ancêtres," La Cité, Antique, 40.

to appreciate the uses and the blessings of agriculture, and were tempted by the witans, or the elders of their tribes, as in ancient Germany, to receive certain allotments of land in exchange for an irregular or nomadic life. The Sanscrit word *griha*, which ordinarily means a *home*, and also signifies a *wife*,[1] may be derived from the root, *graha*, which signifies, *to take*, in the alternative sense of—to seize or to accept; seizure or conquest, it should be remembered, is the most ancient mode of acquisition. Moreover, *griha* may legitimately be compared with the Latin *domus*, (the Vedic दम, *dama*) connected with the root *dama* = to subdue or tame. *Domus*, it should be observed, signifies both a house and a family, and has given rise to the word "dominium" —a term which, as will appear hereafter, is of the utmost importance in the conception of Roman property. The word, *family* itself is used in a variety of senses.[2] In its most ancient sense, Familia meant not only the chief himself and the women and children under his power; but all the goods and all the slaves and in fact all the patrimony of the chief. That is the meaning with which the term is used in the Twelve Tables. For instance—adgnatus proximus *familiam* habeto, *i. e.*, let the nearest agnate have the *family*. The establishment of the *griha*, is, according to Manu, the foundation of the family. Build a house, marry, beget a son, instal the sacred fire, preserve the domestic soil, and you will not famish in the next world—this is the whole *corpus juris* in a simple age, the entire body of rules and duties which are observed by the members of a family. It is the vivid belief in a future life that gives the first law, leaving to the luminous imagination of a later age the invention of the passage across the Styx, and the customary fee to the grim ferryman.[3] The very desire to preserve one's own sanctity would in the beginning restrain men from intermixing no less than intermeddling with each other; but in course of time one house would break up into several, and one common sacrifice unite all the scattered members together. Even in the present day, we find among the Brahmanic people one household deity going the round of a number of houses, ordinarily known as the turn of worship. The simple meaning of which is, that at an early period the deity had been settled in a house or a family, the founder of which was the common ancestor of its subsequent branches. We have no exact information as to whether in Rome there was anything like this turn of worship; but the observance of the *sacra gentilitia*, a sacrifice in which all the members of the *gens* participated, is apparently the same for all practical purposes.[4]

[1] गृहिणी गृहमुच्यते.

[2] Dig. 50, 16, 195 et seq.

[3] Æn. VI, 326. Also, Juven III, 267. Compare the old Roman custom of placing a coin in the mouth of the dead man with the Brahmanic custom of dropping a piece of gold. Compare, also, the Brahmanic ceremony of *Vaitarani* with the Catholic death-bed rite of *viaticum*.

[4] Livy, V, 52.

In offering the periodical oblations of food and water to the ancestors the Aryan was understood to make provision for himself. If the old Aryan was so unfortunate as not to leave a son behind him, he would yet have hopes of sharing with his remote ancestors in the next world a portion of the food which any of the descendants of the latter might offer them on this earth. Hence the origin of agnatic kinship, and the preference of relationship through males to that through females.

It cannot surprise us, therefore, that the old Roman and the old Aryan knew no distinction between law and religion. Indeed, the distinction would then have been one without a difference, for to either of them the next world seemed to be a mere continuation of this. The amalgam, or rather what would appear to the modern jurist as such, is distinctly traceable in the words *jus* and *dharma*. The derivation of the Latin "jus" has been left in considerable obscurity. It has been derived at random from *jussum*, *justitia*, and *dico*. I have no possible doubt in my mind that the word is legitimately connected with *di (v) us*. *Div* in Sanscrit signifies *heaven*, and is the crude form of *djaus* of which the genitive appears as *divas*. Compare the cognate forms *Janus* and *Dianus*, and observe also the stem *Jov* or *Diov* of which *Jupiter* is a compound, meaning indifferently *father of heaven* and *father of justice*.

But whatever may be the etymology of "jus," the original signification of the word was not what a monarch, a people, or sovereign power has deemed to be expedient, it was rather an instinct or belief, that which nobody found possible to shake off, and therefore everybody felt himself bound to obey. Cicero explains the nature of "jus" as that which opinion has not engendered, but what a certain innate force has implanted in the breast of man.[1] According to Ulpian, "jus" includes both human and divine law. The Sanscrit word *dharma* derived from the root *dhri* = to bind, or hold, means not only religion or rule of nature, but also signifies the God of Justice. "The earliest notions connected with the conception of law," observes Sir Henry Maine, "are those contained in the Homeric words, Themis and Themistes; Themis, it is well-known, appears in the later Greek Pantheon as the goddess of Justice."[2] The unity of law and religion was for a long time maintained in Rome, the pontiffs being the sole jurisconsults, and Cicero assures us that a knowledge of the *jus civile* was essential for a good pontiff.[3] The lawyer and the priest being at first one and the same person, the conceit of Ulpian, that lawyers are in a sense priests,[4] which gives Austin an occasion for ridicule, becomes at least historically intelligible. From his special point of view Austin was perhaps justified in his criticism. To the

[1] De Leg. I, 5.

[2] Ancient Law, 4.

[3] De Leg. II. 19.

[4] Dig. 1, 1: "Jus est ars boni et æqui, cujus merito quis nos sacerdotes appellet."

analytical jurist, or one who, like Austin, draws his materials from an observation of the institutions of modern Europe in order to deduce the principles of law and sovereignty, the study of early institutions is alike cumbersome and unprofitable: but he who would trace the genealogy of legal conceptions with which almost every student of our colleges is now familiar, must turn his attention to the fountain-head of Aryan civilization in the East as well as in the West.

What, it may be asked, is the nature of the relation between the ancient conception of law and what Austin may at least claim the credit of having popularized in England and English-governed countries. Austin's peculiar merit consists not in the assiduity with which he addresses himself to the task of delimiting the domain of positive law from that of ethics and religion; but in his exposition of the theory of sovereignty. Austin's Outline of Jurisprudence is an endeavour to build the science of law on a single connotative element of sovereign power, the energy to inflict evil. It cannot be denied that the dread of having to suffer, or endure the loss of comfort, is the most potent factor in restraining men within due bounds. Given an independent political community, the power must always be there in readiness to cause the suffering or inflict the punishment when the occasion may arise—is the essence and foundation of Austin's philosophy of law. It is the fear of having to suffer, as has been already observed, which drove men in a simple age to make provision for after life.

The old Aryan left a son, because, without one, he would incur the risk of starvation after death. His mind was almost incapable of realizing any great distance between the future world and the present. To him the birth of a son was as urgent as the fruit of economy to any of us in view of disease or old age. Indeed, the consequence of his delinquency in not leaving a son behind would appear as imminent to the Aryan as the consequence of the operation of applying the finger to the flame. That primitive men, whether Aryan, Greek or Roman, were absolutely under the dominion of that belief, has already been premised, nor was the belief long in assuming the objective form of ancestor-worship. The moment, however, the Aryan came to discharge his philoprogenitive duty in obedience to the will of a deified ancestor, and transfer his allegiance from the belief to its incarnation, the incident, I presume, would not be very far from satisfying the conditions of the Austinian conception of positive law. The essential difference between the two ideas, it will be readily seen, consists in the substitution of the will of man for the will of a god. How this change was brought about, is a question to which the history of Rome furnishes a direct answer.

If any trust is to be placed on the ancient legends with which Livy among other writers has made us familiar, Numa was at once a king and a priest. The proof which, from their very infancy, the Roman people began to give of an aggressive spirit, could not elude the foresight of that pious monarch, and he accordingly instituted a college of Flamens, that the domestic sacrifices might

not suffer when his successors would be called away from Rome for the purposes of distant warfare.[1]

To the Roman nothing was of greater importance than his religion, and scarcely a single act was valid without the previous ceremony of the auspices.[2] The incidents of property, no less than the incidents of marriage, were deemed sacred, and invested with special formalities. There was, however, in the outskirts of Rome by the side of this peculiar people an inferior class of men who were beyond the pale of the mysterious worship. These were the Plebeians. Under the circumstances they could neither hold any property in the soil nor enter into the legitimate bonds of marriage. Every thing about them was unholy, and their ways were considered to be the ways of the beasts of the forest. They continued to live for some time as mere tillers of the soil and sepoys in the army, until Servius Tullius partially admitted them into the ranks of the populus, and enlisted them in the Roman legion. This was naturally a source of vexation to the Patricians; but the exigencies of war prevented the abolition of the rule which gave the Plebeians a position in the army. The victories which the Plebeians achieved in war, soon opened their eyes to their own importance in the community, and rendered them all the more alive to the burdens of a religion which refused to recognize their customs. At first the object of the Patricians was not so much to keep down the Plebeians as to preserve the religion from contamination. Indeed, the idea of an all-pervading religion, which the Patricians had inherited, incapacitated them from conceiving of law or justice as distinct from religion.[3] To give the Plebeian the benefit of the law was to extend to him at the same time the privileges of the *gens* and the *sacra*. But the acquisition of wealth which arose from the spoils of incessant wars, if it opened the eyes of the inferior classes to their own importance in the community, began to withdraw the men of birth from the beaten track of their ancestors, and gradually paved the way for a system of jurisprudence in which civil rights were left untrammelled by the shackles of religion. The Decemviral code of laws is manifestly one of the earliest fruits of the growing revolution, and as might have been anticipated, the Roman *familia*, the stronghold of religion, was the first to fall under its operation. The Twelve Tables know nothing of the primitive distinction between the eldest and the other sons of a house. All the sons are permitted equally to inherit the patrimony, and the first-born seems to have forfeited that filial regard which, in the eye of the ancient religion, was due to him from the puisnes. The first Decemvirs were all Patricians,[4] and it is primarily the growth of a military spirit, on which Sir Henry Maine lays so much stress,

[1] Livy, I, 20.

[2] Livy, III, 31.

[3] The old form of action was the *actio sacramenti*. Cicero Pro cæcin. 33, "sacramentum pro ipsâ petitione." See, also, Ortolan, His. Rom. Law, 678.

[4] Livy, III, 32, 33.

that, by loosening the minds of the Patricians, encouraged the Plebeians, if not to subvert, to displace the rules of a religion which sorely oppressed them in the private relations of life. The loads of booty with which her warriors returned to Rome came gradually to acquire a new name, designative of a particular kind of property, and the son was enabled to hold his *peculium castrense* as against his father in derogation of the *potestas* or the paternal power.[1] In the presence of the enemy, observes a great writer, Rome became one.[2] The ideal that was ever present before the Roman mind, whether of the one caste or the other, was the glory of arms and the subjugation of strangers. And it is hardly consistent with human nature that the Plebeians, who appeared as conquerors in the presence of the outside world, would submit without a murmur at home to the domination of a class which, whatever may be the hidden character of its belief, was apparently agitated by no other motive than that of self-aggrandisement. The cravings of the flesh inflamed by the sight of foreign plunder, and the prospect of present gratification, became too impatient to wait for the rewards of a remote future or be subdued by the fears of a contingent evil. If contemporary chronicles were still found to record instances of an invocation to religion against the demands of the people, they were for the most part the artifices of an hereditary prestige rather than the genuine outpourings of a Patrician heart.[3] Nor is it possible to expect that policy would long be able to sustain the fabric which had been reared by the genius of faith. Device after device was forged to exclude the inauspicious class from the high offices of state which were now feigned to be part and parcel of the religion. A series of conflicts was the consequence, and after a desperate effort to preserve their ascendancy by detaching the sacredotal functions from the consulate[4] to which the Plebeians had become eligible, the Patricians finally conceded the claim of the people to the priesthood. Religion, it is true, still found a place amid Roman institutions, but driven from every vantage ground, it was content to retire within the narrow confines of Olympus. The Plebeians by gradually working their way into the high offices and the assemblies, had at last succeeded in legalizing their own customs; and the Patricians ended by embracing those very usages which they had at first detested, and then came reluctantly to endure. The solemn form of *confarreatio* made room for the vulgar form of *usus* or marriage by mere cohabitation, and the two classes were indistinguishably mixed up, leaving the waifs and strays of society to shift for themselves and seek occasional relief in riot or insurrection.[5]

[1] Livy II, 41.

[2] La cité antique, 354, "en prèsence de l' ennemi, Rome redevenait une."

[3] Livy, X, 6.

[4] Ibid, VI, 41.

[5] The slave war in Sicily, 104—99, and the rebellion of the gladiators in 73 under Spartacus.

In the whole movement one discovers the gradual ascendancy of political over religious ideas, and how *jus* became transformed into *lex* or the people's will,[1] which the jurist and the philosopher exalted afterwards to the dignity of *jus gentium* and *jus naturale.*

In the beginning by far the largest portion of the functions of the king were those of the priesthood, but the sacerdotal power was by degrees severed from the supreme magistracy; and Cæsar at length absorbed in his person the dignity of the Pontifex Maximus. Numa was king, because he was the pontiff of his people; Augustus was the chief priest of the Romans, because he was their Emperor. Law having been the handmaid of religion, now became the bondwoman of power, and it was no more the belief in a future state, and much less the will of Brahma, Zeus or Jupiter to which a man must look for the law, the rule of his action, but the will of omnipotent Cæsar or a body of Cæsars, whose commands, express or tacit, should henceforth pre-eminently direct the conduct of men.

The new basis on which the people of Rome were united at home received the political denomination of citizenship (Romana civitas). How the Romans proceeded on their career of conquest, how kingdoms were overthrown, how nations were subdued, and their very gods led captive, how foreign institutions were mowed down by the arms of Rome, and how the language, the laws and the manners of the conquerors, were by degrees imposed upon the subject races, are all matters of history. One has, however, to observe that a people, which for a number of years had directed its unrelenting efforts to the breaking down of class exclusiveness at home, was also foremost to maintain the same exclusiveness abroad. It is only upon the assumption of an innate communism in the human race that we are able in some measure to account for the extraordinary jealousy with which for a long time the Roman guarded the rights of citizenship —the *jus suffragii* and the *jus honorum*[2]—even from his Italian subjects. Not even Greece, the exquisite charms of whose fine arts, the divine elegance of whose compositions, and the varied sublimity of whose philosophy, alternately softened the manners, refined the taste, and elevated the mind of Rome, was admitted into the bond of political kinship. It was left to the drunken frolics of the wildest despot that Rome ever beheld to grant to a handful of judges in Achaia the boon of a *civitas* or Roman citizenship.[3]

The conception of law which Justinian has preserved to us in the Digest, was the direct result of the political life of Rome, and may be gathered from the writings of Ulpian and Modestinus, two of the brightest luminaries of the classical age of jurisprudence. Both these lawyers flourished under the house of Severus

[1] Livy, VII, 17.

[2] The right of voting in the assembly, and the right of holding state appointments.

[3] Suet, Nero, 24.

when th fate of the Empire hung in the balance of military despotism, to which one of them in fact fell an easy victim—a circumstance probably calculated to lead to the inference that absolutism is in no way incompatible with the cultivation of law, or the construction of a harmonious system of jurisprudence. Nothing is law but what the Emperor pleases, the Emperor is free from the restraints of law, the essence of law is to command, forbid, permit and punish—these are the approved dicta of the jurisconsults,[1] and Austin has told us nothing new. By the side of these aphorisms, Hobbes's paradox—no law is unjust—no less than Austin's assertion, that sovereign power is incapable of legal limitation, are mere English translations of the Latin sentences.

Neither Hobbes nor Austin can, however, be reproached as the champion of despotism. They both carefully observed the facts of political life around them, and the one endeavoured to reconcile the fact with a supposed reason, while the other contented himself with the statement of a bare fact. The picture which Hobbes presents to us of the Leviathan—the image of supreme power, the author of law—with a sword in one hand, and a crosier in the other, admits of th's plain interpretation that the sovereign power in each state represents in itself the fullest combination of the physical force and the religious belief of the state. Austin goes a step further, and repeatedly tells us that, whatever may be the conception of sovereignty, law is no more than the will of the sovereign power. According to Hobbes whoever happened to violate a law must *ex hypothesi* be a reprobate in every sense of the term in the estimation of the community; whereas upon Austin's premises a man, who every day of his life breaks every item of mere divine or moral law, may be a bad man, but he is not on that account a bad citizen. The difference of view between Hobbes and Austin in respect of sovereignty is noticeable from the strain which Austin is driven to put upon the maxim *no law is unjust*, by amplifying the proposition into "no positive law is legally unjust," and arises evidently from the circumstance that although both the writers steadily kept before them the main ingredient of sovereignty which correlates to subjection, the one now and again turned to consider the reason, while the other stubbornly fixed his mind on the *fact* of subjection.

Now, the complete unanimity which prevails between Ulpian and Austin in their idea of law, tends to show the immense influence of Roman institutions on the political societies of modern Europe. The Barbarian Conquest was not calculated to effect any material or permanent change in that direction. In their native home the Barbarians lived in a more or less lax state of communism. Destitute of every virtue, except what is begotten of an exuberant spirit of plunder, and without any distinct idea of religion, they yet evinced a singular

[1] Quod princeps placuit, legis habet vigorem, D. 1, 4, 1. Princeps legibus solutus est, D. 1, 3, 3. Legis virtns hæc est, imperare, vetare, permittere, punire, D. 1, 3, 7.

attachment to the person of their leader.[1] They served their chiefs with a devotion which bordered on servility, and whether in the countries of Europe or in England, a relation soon grew up between the king and the thanes which has been described by more than one writer as akin to that of master and slave under the Roman Law.[2]

An Eastern religion, it is true, somewhat tardily picked its way into Europe; but so exalted was everywhere the notion of sovereign power, and the military spirit which afterwards broke out in the direction of the crusades was so much on the ascendant,[3] that Christianity, though it achieved some success by wresting religion from the hand of power, was erelong constrained to identify itself more or less absolutely with temporal authority, or assume, as an alternative, the sombre veil of asceticism.[4] It cannot, however, be denied that the spirit of forbearance which it was the mission of Christianity to spread all over Europe, if powerless to extinguish war, has at all events been able to denude it of some of its horrible consequences, and thus prepared the way for more pacific international relations, at least as between the votaries of the same religion. After all, the result has been that the Roman idea of sovereignty and political power is found to be rooted in some of the communities of modern Europe, and England with her territorial acquisitions, perhaps, makes the nearest approach to the parent type. The sovereign power in the British dominions has absorbed spiritual supremacy as the Head of the Church, and invested itself with a partly military and partly religious dignity of the Defender of the Faith. The condition of the Indian Empire discloses the care with which the privileges of British citizenship are guarded. The distinction between the Presidency town and the Mofussil indicates at least some traces of the relative position of the Roman-land (ager Romanus) and the Province, and the resemblance between the Peregrinus and the Native can hardly be overlooked.[5] The rapidity with which the Prætor Peregrinus assimilated the law of the stranger to his own idea of propriety and expediency, meets with its counterpart in the work of the British Indian Legislature and the British courts of justice. I will give you an instance of the danger which is sometimes likely to arise from the desire of assimilation. The British judiciary in consonance with their own ideas of expediency have,

[1] Guizot, His. de la civ, 62. Hallam's Middle Ages, 136. Gibbon's Decline and Fall, C. 28.

[2] Freeman's Norman Conquest, i, 86, 87.

[3] Ducange, tom ii, 651. Gibbon's Decline and Fall, C. 58.

[4] Ranke's His. of the Popes, i, 10—15. Butler's Lives of the Saiuts.

[5] The Roman Empire, while it was a tax-taking, was also a legislating empire. It crushed out local customs; and substituted for them institutions of its own. Through its legislation alone it effected so great an interruption in the history of a large part of mankind, nor has it had any parallel except—and the comparison is very imperfect—the modern British Empire in India. Maine's Early History of Institutions, 330.

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in the case of the "Hindu" widow, extended the principle of the Brahmanic law that right once vested can never be divested,[1] and the Legislature has, in accordance with its own sense of propriety, provided that a "Hindu" widow on her re-marriage should be compelled to divest herself of whatever she might have inherited from her former husband.[2] The strange result that has ensued is, that a widow, who has, in the view of the law, entered upon an honourable alliance, must renounce the effects of her former husband, which the same law would have preserved to her if she had previously embraced an immoral life.

In Brahmanic India, law came by degrees to be distinguished from religion[3]; but not by the same turbulent process as at Rome nor until religion had thoroughly permeated society. The theory of the religious basis of law has, however, never been abandoned. In order to understand the position, it is necessary to bear in mind that religion as the source of Brahmanic law is wholly different from the later systems of Indian theogony. That religion was the religion of the hearth and ancestor-worship. To the Bráhman nothing was law save what flowed from religion. The sanction of law was merged in the sanction of religion, and the punishment for crime in a passage of Manu partakes of the character of expiation. The moment, for instance, a thief is punished by the king, he, such is the sense of the text, is also absolved from sin.[4] No wonder then that the king himself under the Brahmanic system was as much amenable to punishment as the humblest individual in the realm.[5] The English constitutional maxim, that the king can do no wrong, has, therefore, no place in the institutions of the twice-born race. And it is a singular feature of Manu's Code, that the measure of punishment is made to vary directly with the position and education of the guilty person. For example, a king or a learned Bráhman is liable for the same offence to a much greater amount of punishment than an ordinary person, Bráhman, Csatrya, Vasya, or Sudra.[6] A provision, such as this, indubitably points to a more perfect ideal of equality than even the justly admired theory of Bentham. And, I am afraid, the anecdote that, "according to the clear teaching of his religion, a Bráhman is entitled to twenty times as much happiness as anybody else", which the author of the Early History of Institutions has introduced in the midst of a serious discussion with a view to prove the antagonism of the Brah-

[1] *Moniram Kolita* v. *Keri Kolitani*, I. L. R., 5 Cal., 776.

[2] Act XV of 1856, s. 2. Under the law or custom of Gavelkind in England, the widow's interest in her late husband's estate continues only so long as she remains unmarried and chaste. Will. R. P. 234.

[3] Mitákshará, Dáyabhága, Viramitradaya &c.

[4] Manu, C. 8, V, 314, 316, 318.

[5] Manu, C. 8, V, 336.

[6] *Ibid*, C. 8, V, 337-338.

manic mode of thought to the Benthamite notion of utility, should be ascribed to the fancy or ignorance of his Indian interpreter.[1] The ideal which the Bráhman constantly kept before the mind of the people was not the acquisition of wealth or the glory of arms. It was the attainment of knowledge and the conquest of the passions.[2]

It was an easy matter for the Plebeian to aspire to the position of the Patrician; for in it he beheld the prospect of a larger gratification of the desires; but for a Sudra, a Vaisya, a Csatrya, a vulgar Bráhman or even a king to aspire to the rank of a Srotriya or regular Bráhman, involved the rigorous suppression of the desires in the indulgence of which ordinary men are apt to see the vision of happiness. To this circumstance may, probably, be attributed the institution of common Bráhmans, and the rare promotion of the members of a lower class to the condition of the regular Bráhmans [श्रोत्रियः]. And one that has the patience to wade carefully through Manu, cannot possibly lose sight of the fact that it was devotion to the prescribed duties, and not the mere adventitious circumstance of birth that made the Bráhman,[3] and in that sense "entitled him," to repeat the words of Sir Henry Maine, "to twenty times as much happiness as any ordinary individual." Offering gifts to a vulgar Bráhman, in the words of the text, is like pouring clarified butter on ashes.[4] It is the learned Bráhman, we are repeatedly told, that is an object of adoration to the community, and if his person and property were guarded with peculiar care, it is because he was in a special manner the property of the whole community. To become a true Bráhman was in fact to forfeit many of the objects of enjoyment. All the pursuits of life were open to all classes alike; but to the Bráhman alone was forbidden the path of gain.[5] From the meagreness of materials, it would be idle to speculate on the exact status of the Sudra in the primitive times. All that can be said with any degree of certainty of his condition is, that some distinction seems to have been early drawn between the barbarian aborigines (अन्त्यज)[6] and the civilized Sudra, and if the latter were at one time in the position of slaves, the rank at that epoch of the son of a family was scarcely more enviable. The texts of Manu which indicate sanguinary laws against Sudras are, as has been already explained, wholly inconsistent with those texts, some of which extol a Sudra for the performance of religious duties, while others evince anxiety to settle the question of the relative position in society of a

[1] Maine's Early His. of Inst. 399.

[2] Manu, C. 6, V, 60, इन्द्रियाणां निरोधेन रागद्वेषक्षयेण च। अहिंसया च भूतानाममृतत्वाय कल्पते॥

[3] *Ibid*, C. 2, V, 157. C. 8, V, 102. Mitákshará, Part I, C. 8, s. 1, cl. 23.

[4] *Ibid*, C. 3, V, 168.

[5] *Ibid*, C. 2, V. 162, C. 3, V, 156; C. 4, V, 17, et passim.

[6] *Ibid*, C. 8, V, 385, makes a clear distinction between a Sudra and an *antyaja*.

learned Sudra.[1] The absolute prohibition of the *jus connubii* or the right of intermarriage, was unknown to the Bráhmanic race. The hands of Sudra ladies were eagerly sought not only by Csatryas and Vaisyas, but even by the highest Bráhmans, and relationships were thus formed with the lower orders which could not long prevail without producing their effect on the general constitution of society. At a very early stage of Brahmanic civilization, the homogeneity of all the classes was declared by deriving their origin from the different limbs of Brahmá, until the term *alike* in a certain passage in Manu came to imply not *equality by class*, but *equality by quality*. Let us turn to the gloss of Medhátithi—"He is called a given son, according to the Institutes, whom his father or mother affectionately gives as a son, being *alike,—alike* not by tribe," explains the commentator, "but by qualities suitable to the family, therefore a Csatrya, or a person of any other inferior class, may be a given son of a Bráhman."[2] The earnestness with which Manu enjoins the duty of making gifts to the Bráhmans has led some, and, among them, I notice my predecessor in this chair, to conclude that the Bráhman was no exception to the priestly class, whose worldly ambition in the West has unfortunately been much exaggerated by the exigencies of policy no less than by the jealousy of a rival creed.[3] But one should remember that to give to the Bráhmans then was to support and advance the cause of learning, and was like the endowment of a college. The Bráhman not only imparted knowledge gratuitously, but had also to maintain his pupils, and his popularity was known to increase with the number of his disciples. Even at the present moment, in the universal neglect of old institutions, a few Bráhmans may be found here and there to keep and board a number of students after the manner of their ancestors.

Yet the Bráhman was not an ascetic, he lived in the full view of his people. His religion taught him to prize the life of a householder above all other modes of life,[4] and the imperative duty of bringing up a family was productive of unique consequences to society. Until special advantages are conceded to women, nothing can be more injurious to their condition than the masculine institution of celibacy. The Brahmanic religion, by inculcating marriage, raised the dignity of woman. Manu is never tired of conferring blessings and prosperity on those who should respect their women.[5] "That house must go to rack and ruin," observes the sage, "whose daughters are not anxiously looked after, and desolation is the absolute doom of the family in which the women are not elegantly attired and decorated." The wife who in the most ancient epoch in the

[1] Manu, C. 10, V, 73, 127, 128.

[2] *Ibid*, C. 9, V, 168. Mitákshará, Part II, C. 1, s. 11, cl. 9, n.

[3] Tagore Lectures, 1884—85, pp. 77, 95—96. Cobbett's Protestant Reform.

[4] Manu, C. 3, V, 78.

[5] *Ibid*, C. 3, V, 54-62.

history of the Aryan nations, was regarded as scarcely better than a chattel (निरिन्द्रिया), gradually rose under the later Brahmanic system to the dignity of a *patní* or religious spouse,[1] and was able with the authority of the husband to undertake the most religious of all ceremonies, adoption. In the order of succession, the mother has sometimes been placed before the father. The share of the widow in the deceased owner's property is not unfrequently equivalent to that of a son, and her claim to maintenance is indefeasible at all times. Nor was the daughter's interest forgotten. The father is solemnly urged to obtain a suitable match for his daughter, and lest the inducement of gain should prevail upon him to offer her to an unworthy person, he is forbidden to receive a gratuity from the bridegroom.[2] By his neglect to give his daughter in marriage in due season, the father loses all control over her, and she being thus emancipated may choose whomsoever she likes. Nevertheless, Manu informs us, that it were far better that a girl was not married at all, than that she should be thrown away on the undeserving.[3] It seems as if the founders of the Brahmanic religion, in spreading the belief of the necessity of a son, felt that the virtue of providing for a helpless woman was a sufficient atonement for the evil of throwing on the stronger sex the onerous duties of bringing up a family. The result is that marriage portions are carefully secured for the unmarried girls of a family,[4] and the first consideration with the Brahmanic people even at the present day is to find, regardless of all expense, suitable homes for their daughters. The Bráhman, in his extreme tenderness, placed the widow under the special protection of the king, and prevented by severe sentences the male relations of a woman, not even excluding the husband, from interfering with her property.[5] The respect for women rose to such a pitch, that second marriages on the part of the husband were looked upon with disdain[6], the life of a woman was deemed to be inviolable, and even a Bráhman was commanded to take up arms in order to save a woman.[7] The sanctity attached to the person of a woman at length culminated in a later age in the worship of woman under the appellation of Shakti.[8] Indeed, the alliterative character of the two words *stri* and *sri* has suggested to the imagination the identity of the wife with the goddess of prosperity, and it is a reproach,

[1] Manu, C. 9, v. 45.
[2] *Ibid*, C. 3, v. 51.
[3] *Ibid*, C. 9, v. 89.
[4] *Ibid*, C. 9, v, 118.
[5] *Ibid*, C. 3, v. 52. C. 8, v. 28-29.
[6] *Ibid*, C. 3, v. 12. C. 9, v. 101.
[7] *Ibid*, C. 8, v. 349.
[8] Cf. The religion of Humanity of Comte, and the expressions, *sexe aimant, les vrais anges gardiens* &c. of the Positive Creed.

at the present moment, even to the basest man to raise his hand against a woman. The two prominent elements of Brahmanic civilization are—the spirit of forbearance or self-control, and the regard for women. Both these elements have exercised a marked influence on Brahmanic jurisprudence. The one has impressed itself on the law of joint family with its well-known characteristic of mutual help and cooperation, while the other has developed the law of maintenance, woman's property or *stridhan*, and woman's heirship. It is the want of a due appreciation of the leading elements of the religion of the race that has sometimes been productive of startling errors. The rapid growth of wealth and luxury in Rome, while it fostered female independence, was not without its evil effects on the morality of the age, and, towards the close of the Republic, two laws were passed which directed their aim against the freedom of women. The Lex Oppia, 540 A. U. C., enacted that no woman should have in her dress above half an ounce of gold, nor wear a garment of different colours, nor ride in a carriage in the city or in any town or within a mile of it unless on the occasion of a public ceremony. The Lex Voconia, 584 A. U. C., ordained that no one should make a woman his heir nor leave her a large legacy. You are aware that the disruption of the Roman Empire was by no means favourable to the condition of women. The position of woman in Feudal times was far from enviable, and a married woman under the Common Law of England is not able to call an inch of ground her own without the leave of her husband. Hence it is, perhaps, that the liberal principle of the Brahmanic religion in regard to women has not unfrequently presented a stumbling-block to British observers. Certain remarkable passages in the Early History of Institutions furnish an apt illustration.[1] Instructive as are all the writings of Sir Henry Maine, still I should not have thought it necessary to allude to them in this place, but for their occasional tendency to lead the mind away from a careful and patient study of Brahmanic institutions. The author's intimate knowledge of Roman jurisprudence impressed him with an intense admiration for the Roman system as a whole; much no doubt for its own sake, but partly also as a parent institution to his own. He was well aware of the early struggles of the Plebeians with the Patricians, and the victory achieved by the weaker race evoked a sympathy which, in the mind of the jurist, remained associated with the trammels of, what seemed to him to be, an obstructive religion. With this frame of mind, Sir Henry Maine applied himself to the study of Brahmanic jurisprudence. Of that jurisprudence the corner-stone is religion, and he was impelled by an almost irresistible instinct to place the Brahmanic system under the type of stationary societies in opposition to the Roman or the progressive type. "We can see," he observes in his Ancient Law, "that Brahmanical India

[1] Maine's Early His. of Instit. 334—340.

has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion."[1] He worked his mind into a positive conviction that whatever material civilization there may be in such a society, the civilization instead of expanding the law is itself limited by the law. The idea which he had thus conceived of Brahmanic society was not likely to improve upon a personal, but casual, acquaintance with the surface of that society in India. Altered forms of government had been accustomed for years to demand their due share of allegiance from the country, and assuming by degrees the functions of the *Srotriya*—the judges and the legislators of a former age—finally left an indifferent laity in the hands of an unlearned priesthood. Bengal, the seat of the metropolis of British India, had, moreover, been shaken more than once by foreign invasions and the dread of foreign invasions. The seclusion of women which had become a positive institution in the large towns filled his English mind with horror, the accounts which he received of *suttee* shocked him, and he was more than ever strengthened in his belief that no good could possibly come from a society which did not know to distinguish positive law from antiquated religion. And he came forward with a distinct answer in a later work which he had hesitated to do in his Ancient Law. "If we are asked," he tells the students of Oxford in his lectures on early Institutions, "why the two societies with which we have been concerned—the Hindu on the one hand, and the Roman and all the races to which they have bequeathed their institutions on the other, have had so widely different a history, no reply can be very confidently given, so difficult it is for the vast variety of influences acting in great assemblies of men to single out any one or any definite number of them, and to be sure that these have operated more powerfully than the rest; yet if it were absolutely necessary to give an answer, it would consist in pointing to the difference in their social history which had been the subject of this lecture, and in observing that one steadily carried forward, while the other recoiled from, the series of changes which put an end to the seclusion and degradation of an entire sex." In other words, nearly his own, the distinctive feature of a progressive society consists in the recognition of "the personal immunity and proprietory capacity of women." Under the circumstances what embarrassed him most was the liberality shown to women by what must have appeared to him as the most orthodox school of Brahmanic law, the Dáyabhága, with its cardinal doctrine of spiritual benefit. And the accomplished scholar and jurist by an almost desperate effort of the imagination arrived at the conclusion that, as a corrective to Jimutaváhana's principle of the widow's right of succession to the husband's property (which practically extended to the absolute disposal of

[1] Maine's Ancient Law, 23.

the entire estate), "the Bráhman lawyers in obedience to the dictates of some religious custom endeavoured to get rid of the rule of widow proprietorship by inventing or at all events encouraging the ceremony of *suttee*."

I am unable to say whether the Voconian law of Rome contributed any share to the formation of this startling conclusion; but, as if in remembrance of the retrogressive character of that law, the author observes, "the widow was made to sacrifice herself in order that her tenancy for life may be got out of the way * * * and the Bráhmans who exhorted her to the sacrifice were undoubtedly influenced by a purely professional dislike to her enjoyment of property." That some such explanation should be given was an absolute necessity; for the basis of the division of societies into the stationary and the progressive mainly rests upon his assumption of the divergent position which woman is imagined to occupy under the two types. The inference is all the more startling, for, upon the theory of Sir Henry Maine himself, it would be the interest of a priestly caste, "the donee of pious gifts" in all creeds,[1] to concentrate property in the hands of women, a class which has been known at all times to be peculiarly susceptible to religious influence. The reason for the *suttee*, if it be necessary to give one, is of a less atrocious origin. Instances of conjugal fidelity have been observed in all ages. Porcia's devotion, and Paulina's love are themes on which Roman historians have delighted to dwell, and Arria's impassioned words to her condemned husband, Pœtus, with the dagger scarcely drawn out of her reeking breast—*Pœte non dolet*—have not yet ceased to thrill us with an awful admiration. In India, such a feeling was naturally heightened by the institution of early betrothals, and if you add to it an unshaken belief in a future state of existence where all believers expect to enjoy the eternal companionship of their beloved ones, the origin of *suttee* will not be far to seek. The peculiar rite of *suttee* unknown to Manu was, as Sir Henry Maine himself assures us, confined to the aristocracy alone,[2] and there is strong reason to believe, that it was the barbarous pride of a military caste, with its false but cherished notions of female honour, that imparted to an occasional practice the character of a quasi-custom.

Whatever may be the relative merits of the Brahman and the Roman civilization, to import one's own idea of the superior claims of the latter into an investigation of the province of Brahmanic jurisprudence is not likely to be attended with useful results. Nor is the promptitude with which jural relations are altered, as for instance in Rome, a necessary index to the political happiness of a people. The most fruitful season of Roman jurisprudence was also the most despotic period of Rome's history, and the radical changes in the law to be observed in the Novels bear equal testimony to the genius and absolutism of

[1] Maine's Early His. of Inst., 56.

[2] *Ibid*, 335.

Justinian. The value of Brahmanic law consists in its being a system of purely domestic growth. The Brahmans were an isolated people. They were neither anxious to impose their institutions upon others nor borrow from foreign institutions, after the manner of the Romans. Yet, in common with many other things of the world, the Brahmanic law fell under the principle of change. Among the means by which that law adapted itself to circumstances may be especially enumerated the recognition of custom, and the admission of the doctrine of "pure reason."[1] Religion never became factious here as in Rome, and, far from throwing obstacles in the way of the inferior classes, it actually lent its sanction to such practices as were at first deemed to be obnoxious, and, probably, saved society from those upheavals which constitute some of the most painful chapters in the history of Rome. By permitting a family, a tribe, or a place to follow its own custom, the Brahman evidently admitted a mass of rules by the side of the primitive religion, while with the assistance of "pure reason," successive jurists were able to introduce through their commentaries a large number of innovations upon the old texts. For what I have called "pure reason," the Sanscrit word is *yukti*, from the root *yuj* = to join or to be consistent with, and the strict import of it seems to be the reconciliation of custom with some accepted principle of religion in quest of justice. For instance, it was an old law or religion that the eldest son should succeed to the status of the father and hold the younger sons in filiation to himself under the paternal roof. Now, it was not likely that such a thing could go on for ever. Families would increase in size, and a sense of mutual convenience would suggest the necessity of separation. What does the commentator do? He does not abolish nor even disapprove of the old law; but commends the practice of separation and partition on the ground, that the breaking up of one family into several would, by multiplying the number of oblations, produce more numerous benefits to the deceased progenitor.[2] Similarly, Kulluka, the celebrated Bengali glossator, observes that the text of Manu which pronounces the inapplicability of the nuptial formula (पाणिग्रहणिका मन्त्राः)[3] to all but virgin marriages, refers only to the sacred or pure (धर्म्ये) marriages among the twice-born classes, and should not be construed to the general detriment of non-virgin marriages.[4]

A text from the Vedas cited by Baudháyana[5] expressly declares the incapa-

[1] युक्तिहीनविचारेण धर्महानिः प्रजायते। Vrihaspati. स्मृत्योर्विरोधे न्यायस्तु बलवान व्यवहारतः— Yajnavalkya, C. 2, v. 21. *Nyáya* and *Yukti* are indifferently used in the Shastras for what I have called *Yukti* in the context.

[2] Manu, C. 9. v. 110, 111.

[3] Manu, C. 8, v. 226.

[4] Pandit Bharat Chandra Siromani's Institutes of Manu, 470: धर्म्योविवाह इत्यर्थः न तु चतयोनेष्वैवाहिक मन्त्रहोमादि निषेधकमिदं C. 8, v. 226, note.

[5] Dáyabhága, C. 11, 5, 6, cl. 11. Viramitrodaya, C. 3, p. 7, cl. 2. See Pundit Golap Chunder Shastry's Viramitrodaya, 198.

city of women to hold any property, and a passage of Manu evidently follows the injunction in excluding the widow from all share in the husband's patrimony.[1] Jimutaváhana, by the pious device of religious benefits,[2] accords to the widow a place after the *putra*, or the son and his male issue to the third degree. And Sricrishna, a later commentator in Bengal, sums up the arguments by declaring that the wife's right of succession is founded on reason.[3] It is interesting to note how the daughter and her son were introduced into the order of succession. Under the old religion, a woman on her marriage is wholly cut off from her father's family. She goes to a different *gotra*. It was, however, argued at first that the maiden daughter not being a stranger should inherit the property of her deceased father; "a maiden daughter takes like a son," observes Devala.[4] A rule was subsequently introduced by which a daughter was *appointed*,[5] whereby she became like unto a son, and was able to raise heirs who, by their capacity to offer oblations to their mother's paternal line, would be entitled to succeed to the estate of the maternal grandfather. By degees, the principle was extended to the sons of other than appointed daughters, and the daughter's son now takes the property as absolutely as one's own male offspring. Nárada was, I believe, the first to accentuate the departure from the old faith by laying down emphatically that the daughter succeeds because she is equally a cause of perpetuating the race.[6]

You are aware that such is the necessity of a son in Brahmanic society that the want of one has to be filled up by means of adoption. Well, in a matter of so much importance, one should from Roman analogy have expected the Bráhmans to reserve all the advantages on their own side, whereas we find that on the equitable principle of allowing to each the observance of his own custom, the Sudras are practically left unfettered in their choice as to whom to adopt, while the Bráhmans are restricted to a definite class of relations. Herein the old Patrician policy presents a marked contrast. Not only were the Plebeians shut out from religious worship, but their customs were, under the peculiar circumstances, held to be profane, and indeed reputed to be loathsome. The Bráhmans, on the other hand, not only admitted the claim of the Sudra to participate in the most momentous sacrificial ceremony of adoption, but, at the same time, in view of right reason, refrained from withdrawing from him the enjoyment of customs which were grossly at variance with the ancient religious distinction of *gotra* or gens. We know that in conformity with the old faith a man could not

[1] Manu, C. 9, v. 85.
[2] Dáyabhága, C. 11, s. 1, cl. 32, &c.
[3] Dáyabhága, C. 11, s. 1, cl. 45.
[4] Dáyabhága, C. 11, s. 2, cl. 5,
[5] Manu, C. 9, v. 127.
[6] Smriti Chandricá, C. 11, s. 2, cl. 9.

marry within his own *gotra*. The *gotra* was the beginning of kinship. Hence the daughter ceased to be kin the moment she was given away in marriage. Now, the Sudras, like the Plebeians, did not at first possess a *gotra* or gens. In the strict sense of the term, there could be no kinship among them nor any law of prohibited degrees. The adopted son, in the eye of the law, is the shadow of the true offspring, and therefore it was forbidden to adopt one whose mother the adopter could not lawfully marry.[1] In time the Sudra came to possess a gens; but was, nevertheless, allowed, in view of his own custom, to adopt a daughter's or a sister's son which, in the case of the twice-born, is deemed historically to be little short of incestuous affiliation. We thus find that the modern rules of adoption not only throw light upon primitive manners, but their mode of application to the Sudras is an instance out of many by which society was harmonized in Brahmanic India. The recognition of the right of illegitimate sons to the inheritance among Sudras point in the same direction.[2] Custom thus came to be the first law in the land.[3] So varied and numerous did family and class customs become, owing to the multitude of castes and callings,[4] that in every judicial proceeding the appointment of assessors was considered to be indispensable.[5] And it took all the ingenuity of the Jurisprudents to reconcile new manners with ancient belief. The extension of the principle of spiritual benefit to a vast number of cases in the rule of succession was, under the circumstances, no ordinary task, and the amount of labour and thought which it involved is apparent from the writings of Jimutaváhana. But although the theory of religion as pervading all law was steadily kept in view, yet, so great at times was the exigency of custom that we find that the author of the Mitákshará was driven, at a comparatively early period, to account for the origin of property on other than religious ground.[6]

The different schools of *Hindu* law, as they are now called, give evidence of the gradual introduction and legalization of custom before which the written texts of the law had not unfrequently to make way.

"The remoter sources of the Hindu law," as was observed in the Madura case[7] "are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The com-

[1] Vyávasthá Darpana, 852. Dattaka Chandricá: पुत्रच्छाया,—पुत्र सादृश्यं नियोगादिना स्वयमुत्पादन योग्यत्वमिति यावत् ।

[2] Manu, C. 9, v. 179.

[3] आचारः परमोधर्मः श्रुत्यु ः स्मार्त एव च, Manu, C. 1, 108.

[4] Manu, C. 8, v. 41.

[5] Mitákshará, C. 1, s. 1, cl. 13.

[6] Mitákshará, C. 1, s. 1, cl. 72, C. 2, s. 1, cl. 14.

[7] 12 M. I. A. 435.

mentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Then, the Mitákshará which is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Dáyabhága in those points where they differ, was a commentary on the Institutes of Yájnavalkya; and the Dáyabhága, which, wherever it differs from the Mitákshará, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yájnavalkya. In like manner there are glosses and commentaries upon the Mitákshará which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all. * * * The duty, therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earlier authorities, as to ascertain whether it has been received by the particular school which governs the District with which he has to deal, and has thus been sanctioned by usage. For *under the Hindu system of law, clear proof of usage will outweigh the written text of the law.*" "The Hindu Law," it was said in Bháyá Ram's case,[1] "contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should commentators interpret the texts by the application to the language of strained analogies."

So rapid was the growth of temporal wants and new customs that, even as early as the time of Manu, we find that, of the eighteen heads of dispute or litigation,[2] one only, the law of inheritance, can strictly be said to draw its materials from the principles of religion,[3] and the king or the chief judge is repeatedly enjoined to decide causes by a careful observance of the customs of classes, of districts, of trades and of families.[4] It may, indeed, be affirmed that the idea of religion finally came to fill, in Brahmanic jurisprudence, something of the character of the Austinian doctrine of God's will as the ultimate source of law. "Happiness," declares Manu, "is the great object of man."[5] According to Austin, utility should be the basis of law, because God wills the happiness of all His creatures. Austin's conception of the divine basis of law is, however, a mere fiction invented for the purpose of giving a religious colour to the purely secular theory of Bentham, that temporal good is the natural and real goal of human

[1] 13 M. I. A. 390. Also, Ranee Pudmavaty's case, 4 M. I. A. 290.
[2] Manu, C. 9, v. 3.
[3] *Ibid*, C. 9, v. 136.
[4] *Ibid*, C. 8, v. 3 and 41.
[5] *Ibid*, C. 7, v. 100.

ambition.[1] And, in order to understand Austin's definition of positive law, one may with impunity put aside his elaborate disquisition on utility as the divine basis of jurisprudence. On the other hand, religion with the inseparable belief in a future state runs through every vein of Brahmanic society, and is the root-idea of Brahmanic law. Hence it is that, in the works of comparatively modern jurists, we sometimes find a confusion between a rule of law and a rule of religion, and although *áchára* (custom) continued to make great way in Brahmanic society, *dharma* was never so completely merged in it as *jus* was in *lex*, or the will of God in the will of the prince or the populace.

Meanwhile, to the Kshatrya line of kings succeeded the Patans and the Mughals. The regard of the Mussalman for his own religion and religious observances persuaded him for the most part to leave the development and administration of their own civil law in the hands of the old inhabitants. Raghunandana flourished in Bengal in the height of the Mughal power, and Sricrishna Tarkálankár closed the long series of commentators. This remarkable circumstance, probably, led Sir Henry Maine to characterize the Mughal as a merely tax-gathering power as distinguished from the Roman. "The Empire of the Roman," observes the learned author, "for one reason alone, must be placed in a totally different class from the Oriental despotisms, ancient and modern, and even from the famous Athenian Empire. All these last were tax-taking empires which exercised little or no influence on the customs of village communities or tribes; but the Roman Empire, while it was a tax-taking, was also a legislating Empire."[2] It is, doubtless, true that the idea of a direct legislation would hardly occur to the mind of a people, the origin of whose law was contained in a revealed Code; but, nevertheless, the Mughal was not merely a tax-gathering power. That power introduced much in the shape of indirect legislation. The concern of some of the Emperors for the education of their subjects is manifest from the minute academical rules laid down in the *Ain-i-Akbari*. We are told, for instance, that, in studying Sanscrit, "students ought to learn the Byákarana, Niyáy, Vedánta aad Patánjal; for no one should be allowed to neglect those things which the present time requires."[3] There is ample evidence that beyond such questions as were inseparably mixed up with the religious customs and observances of the people, the Cazis, who were entrusted with the decision of all causes, were in the habit of deciding cases of

[1] Bentham's Principles of Morals and Legislation, 8.

[2] Early Hist. of Inst. 330.

[3] Blochmann's Ain-i-Akbari, 279:—Every boy ought to read books on morals, arithmetic, astronomy, physiognomy, household matters, the rules of Government, medicine, logic, the *tabii* (physical), *riyazi* (mathematical), and *ilahi* (theological) sciences. These regulations shed a new light on schools, and cast a bright lustre on Madrassahs."

general interest by the aid of the equitable principle of *urf* or custom.[1] The Mussulman law of wills and pre-emption did not fail to make some impression on the existing body of Hindu law, and the frequent occurrence of such words as *báenámá* (deed of sale), *tamassuk* (bond), *bint* (daughter), *ibn* (son), *ásiatnámá* (will), *haqshafá* (pre-emption), in legal documents of daily use between Hindu and Hindu, not many years ago, in the meanest villages of Bengal, bear strong internal testimony to the influence of Mussulman manners on the less secular type of Hindu jurisprudence.

At the close of the Mughal Empire, law may be divided into two general heads; there was, on the one hand, a law, for instance, the law of crimes, which governed all the inhabitants of the territory, irrespective of birth, descent or creed, and, on the other, a law which affected classes or portions of the community according to their faith or caste. It has been already observed that, under the Brahmanic government, class or personal law existed side by side with the general law of the Shastras, which may be described by the now well-known term of territorial law.

The tendency of British rule has been to mould into one form, after the manner of the Romans, the diverse customs and laws of the multitudinous native population. The rapidity with which laws are made in the shape of ever-increasing Acts, and the continuous growth of judicial decisions even on questions of purely native laws by English or English-educated judges, will in course of time accomplish the work. "The influence of English Government, of an English mercantile class, of English literature, and acquaintance with English institutions," observe the Law Commission appointed to report on the Transfer of Property Bill amongst others, "made the adoption of English law in its leading principles an inevitable necessity for modern India. The new conditions of social existence raised questions to which the indigenous law gave no answer or worse than none. Recourse was instinctively had to the law which furnished the requisite solutions, and its decision once admitted in a few cases exacted conformity throughout a wide area to the principles on which they rested in order to prevent obvious and glaring contradictions. The English race could effectively construct—could even imitate—no civilization but the English; and of this the English law is a vital part. Step by step it made its way by occasional direct legislation, by methods of exposition and by the judgments of the courts in a fragmentary way into every corner of the country; * * * * in the new difficulties which were daily arising, the Native Judges, cut off by an elaborate education from sympathetic accord with the thought of their own people, ill-read in their own legal literature, and thoroughly conscious of the tests by which their abilities would be appraised, would resort for guidance to the English text-books."

[1] Hamilton's Hidáyá.

At the earliest period of the British settlement in India, long before any notion of sovereignty had dawned upon their minds, the handful of "adventurers," as they are known to the student of history,[1] established their own law in a small corner of Hindustan, not only among themselves, but were even anxious, it would seem, to make it the territorial law of their little factories. In the Mayor of Lyons case, Lord Brougham makes allusion to this circumstance in these words :—"Till 1678 their (the British adventurers') whole object was to obtain the power of trading, and it was only then that they secured it by a firman from the Emperor; from that year till 1676 they in vain applied to the Native Government to fortify their factory on the Hooghly : there happened to be natives settling within the factory, and when the Nawab was on this account about to send a cazi or judge to administer justice to the natives, the Company's servants bribed him to abstain from doing so; but it is equally certain that, for a long time after the first acquisition, no English authority existed there which could affect the land or bind any but British subjects."[2] However, not many years after the battle of Plassey, the Supreme Court, founded by Royal Charter, in 1774, with the avowed object of dispensing English law at Fort William in Bengal, was, in 1781, entrusted with the administration of Gentoo[3] and Mahommedan[4] law upon questions affecting inheritance and succession to lands, rents and goods, and all matters of contract, and dealing between party and party; and by Regulation III of 1793 and II of 1794, a similar provision was extended to the Company's courts in Mofussil-Bengal, and English judges were charged with the duty of determining all other matters according to justice, equity, and good conscience. The zeal with which some of the judges devoted themselves to the discharge of the formidable duty that was imposed upon them, is apparent from the monuments of industry left us by Colebrooke and Jones amongst others; but it is equally certain that many, nay most of them, must in the nature of things have laboured under a conscious feeling of uneasiness, which before long found distinct utterance in the judgments of the highest judicial authorities in England. In *Ranee Padmabutty*,[5] the Right Hon'ble T. Pemberton observes :—"Now it is admitted that it is utterly impossible for any European court to weigh very nicely the effect of evidence of this kind as to particular ceremonies as establishing the fact of one law prevailing or the other." Later on, in *Bháyá Ram's* case,[6] the Right Hon'ble Robert

[1] Bruce's Annals, p. 128.

[2] 1 M. I. A. 305.

[3] The term "Gentoo" is probably a corrupt Portuguese word meaning "heathen." Hamilton in his introduction to the Hedáyá and some other European writers endeavour to derive the word from *jantu* (जन्तु), an animal!

[4] The proper appellation is *Mussalmán* from *Islám*.

[5] 4 M. I. A. 290. [6] 13 M. I. A. 390.

Phillimore insists upon the difficulty of dealing with questions of Hindu law and custom, and proceeds to approach the "somewhat difficult subject with an unfeigned desire to decide it in harmony with the religious feelings of the Hindus.[1]"

Notwithstanding the Charter of the Supreme Court, the question as to how, when, and to what extent, the law of England became the law of British India, has been involved in some difficulty and formed the topic of some discussion. In Freeman *v.* Fairilie,[2] Lord Lyndhurst held that land in the hands of British subjects in this country was a freehold of inheritance, and in his opinion "all the charters applicable to the state of the law, and all the Acts of Parliament which referred to it from the year 1601 downwards, adverting particularly to the Charter of 1726, point to the conclusion that English law is the law of the Settlement, and, as far as British subjects are concerned, is not only the law of Calcutta at this time, but has been so from the early period of the Settlement." There were, it would seem, two rival schools of opinion, one contending that when Englishmen established themselves in an Oriental country, they carried with them the laws of their own state, and those who lived amongst them and became members of their own community, became also partakers of and subject to the same law; while the other maintained that the settlers should be understood to have adopted so much of the law of the mother-country as was conformable to their novel situation, and until removed by the Supreme legislature native inhabitants must be considered to remain subject to their own law. In the case of the Indian Chief,[3] Lord Stowell, in 1800, expressed as his opinion that the Law of England was the law of the British possessions in India, and so much of Hindu and Mahomedan law as was admitted there was merely of an exceptional nature, and bore the same character as the Jewish customs did in England. "Wherever even a mere factory," observes that learned Judge, "is founded in the Eastern parts of the world, European persons, trading under the shelter and protection of the establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the Western parts of the world, in which

[1] The term "Hindu" is not a Sanscrit or Brahmanic but a Yávanika name. The Greeks (McCrindle's Ancient India, 4) used to call the Indians indifferently *Hindus* and *Aithiopes*. It is extremely probable that the "S" of the Sanscrit word *Sindhu* (the River Indus) appears as an aspirate in Greek, and the Ionians (Hunter's Orissa, 209-213), who formed a part of the Persian Empire and are said to have settled in the North West frontier of India, taught the name Hindu to the Persians. The word *Hindu* in the Persian language signifies "black" or "a black-man."

[2] 1 M. I. A. 342.

[3] 3 Robinson's Admiralty Rep. 29.

men take their national character from the general character of the country in which they are resident, and this distinction arises from the nature and habit of the countries. This country exercises the power of declaring war and peace which is among the strongest marks of actual sovereignty, and, if the high, or, as I may almost say, the empyrean sovereignty of the Mughal is sometimes brought down from the clouds, as it were, for the purposes of policy, it by no means interferes with that actual authority which this country and the East India Company, a creature of this country, exercises there with full effect. The law of treason would, I apprehend, apply to Europeans living there in full force. It is nothing to say that some particular points of our Civil Code are not applicable to the religious or civil habits of the Muhammadan or Hindu nations, and that they are on that account allowed to remain under their own laws. I say this is no exception; for, with respect to internal regulations, there is amongst ourselves in this country, a particular sect, the Jews, that in matters of legitimacy and other important subjects, are governed by their own particular Regulations and not by the Municipal laws of this country, some of which are totally inapplicable to them." In *Ram Lall Thakur*,[1] upon a question whether an action could be maintained on a wager, Lord Campbell was clearly of opinion that beyond those matters which were specially reserved to the native inhabitants, the Common Law of England was the supreme law in British India. On the other hand, in *Advocate-General* v. *Ranee Sarnomoyi*,[2] in dealing with the question whether the goods and chattels of a Hindu *felo de se* should be forfeited to the Crown, the judgment proceeds "but this was not the nature of the first settlement made in India—it was a settlement made by a few foreigners for the purposes of trade in a very populous and highly civilized country, under the Government of a powerful Muhammadan ruler with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards. If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled," and the conclusion was ultimately arrived at that the English law of forfeiture could not be made applicable at least to the Hindus and Muhammadans. This judgment was in entire conformity with the principles enunciated by Lord Mansfield in *Campbell* v. *Hall*,[3] that "the law of a conquered country continues in force until they are altered by the conqueror; the absurd exception as to Pagans mentioned in Colvin's case shows the universality and antiquity of the maxim; * * * that distinction in all probability arose from the mad enthusiasm of the croisades." It was decided in the Mayor of Lyons case, upon the doctrine laid down by Blackstone, and approved by Sir William Grant, M. R. in *Attorney-General* v. *Stewart*,[4] that "only so much of the English law is carried

[1] 4 M. I. A. 349.
[2] 9 M. I. A. 424.
[3] 1 Cowper's Rep., 208-209.
[4] 2 Merivale's Rep., 161.

into a settlement as is applicable to the situation of the settlers and to the condition of the infant colony," and thus the law of mortmain has never been recognized in British India.[1] Nor the English statutes against champerty.[2] At the present moment the question of the importation of the law of England *eo nomine* into British India has lost much of its practical importance. Under the Indian Council's Act the Governor-General in Council is empowered with the sanction of the Secretary of State to make laws for all subjects, British or native, in this country. That power has by no means been sparingly used, and the Indian Succession Act is a notable instance of the encroachment made on the Common Law rule of succession to lands situate in British India. The Hindu Law of marriage and succession has equally come under direct legislation. A native Christian may now lawfully succeed to the estate of his deceased Hindu father,[3] and it is at least possible for a Hindu widow to rekindle the nuptial fire.[4] The Law of Contract which is intimately connected with the Law of Transfer of property has been embodied in a general code; but there still lurks an anomaly, however slight and trivial, in matters of contract between Hindu and Hindu, in relation to the law of Calcutta, or the Presidency Town, and the Mofussil. It has been held more than once by the High Courts of Calcutta, Madras and Bombay that Manu's rule of interest,[5] better known as the law of Dámdupat, is as a part of the Hindu Law of Contract still in force as between Hindu and Hindu in the High Court in its ordinary Original Civil Jurisdiction; but that law has never been recognized in the Mofussil. Act VI of 1871 has since replaced the old Regulation on the subject, and clearly points to the direction in which the Legislature is advancing, *viz.*, that the exception to section 24 of the Act will by degrees absorb the rule. That section runs as follows:—"When in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans and the Hindu law in cases where the parties are Hindus shall form the rule of decision, *except in so far as such law has by legislative enactment been altered or abolished.*" "The judgment of the Privy Council in *Varden Seth Sam* v. *Luckputhy Royjee Lallah*,[6]" observes Couch C. J., "is an authority of the highest Court of Appeal that, although the English law is not obligatory upon the Courts in the Mofussil they ought, in proceeding according to justice, equity, and good conscience, to be governed by the principles of English law applicable to a similar state of circumstances.[7]

[1] 1 M. I. A. 176.
[2] L. R. 1, I. A. 241, 3 I. A. 23.
[3] Act XXI of 1850.
[4] Act XV of 1856.
[5] Manu, C. 8, v. 151.
[6] 9 M. I. A. 303.
[7] Dádá Honáji *v.* Bábáji Jagushet, 2 Bom. H. C. R., 40.

For the Law of Transfer of Immoveable property *inter vivos* one has mainly to look to the Transfer of Property Act. The persons to whom the provisions of that Act are wholly applicable are those who have from time to time been designated in the Acts as "persons to whom the English law applies," namely, European British subjects and their descendants, and others who fill a somewhat amphibious character between a foreigner and a native, such as the Armenians, the Jews, the Parsees &c. But with a few exceptions here and there, the Act will continue to be the primary source of that branch of law among all nationalities and creeds. There is, however, still the necessity to refer to the principles of Hindu and Muhammadan laws upon the question of alienation, and a student of law in this country may be specially warned that the difficulties of attaining a full and complete knowledge of British-Indian Jurisprudence with its complex, varying, and not unfrequently disparate systems of law, its codes, and innumerable decisions, and with constant references by the bar and the bench to purely English precedents, are by no means inconsiderable, and in this connection, the important words of Lord Romilly in *Mullings* v. *Trinder*,[1] when divested of their sarcasm are well worthy of remembrance :—"I admit the law is very difficult to determine ; but I hope that by means of improvements, the law will ultimately be reduced into a state that a man of ability who has devoted his whole life to the subject, may be able to tell a person what the law really is on any one point."

[1] 10 L. R. Eq., 449.

LECTURE II.

THE RELATION OF LAND TO THE FAMILY AND THE STATE.

Primitive notion of Property—Jimutaváhana's definition of Property—Definition of Property in the French Code—Religious character of Property—Brahmanic notion of a *vástu*—Cicero on Dwelling-houses—Brahmanic and Roman forms of architecture, Meaning of—Religious benefits as the reason of Transfer—Exclusion of females in ancient times—Brahmanic and Roman notions of an Heir—The prohibition of the sale of land—Peculium Castrense of the Romans, effect of—Brahmanic conception of "gains of service"—Father's absolute proprietorship prescribed by Jimutaváhana—"Nemo est hæres viventis"—Primogeniture in England, origin of—Hlaford and the royal caste—Mercheta, custom of—Guizot's Feudal society—Manu's description of a Royal Mansion—Brahmanic and Feudal Sovereigns, compared—Hereditary nature of offices under Brahmanic administration—Mussulman sovereignty, character of—Status of zemindars, origin of—Family, the ultimate basis of Feudalism—The Russian Mir—Bháiáchárá and Frérage tenures—Feudalism developed by Conquest—Thierry on the term "feudal"—Homage and Fealty—Bocland—Ancestral land in the time of Alfred the Great, character of—Early grants of land in England—Statute, De Donis Conditionalibus—Statute, Quia Emptores—Military tenure and Socage tenure—Land and State—Brahman, Mussulman, and British theory—The Permanent Settlement—Zemindari Tenure—Government as Parens Patriæ—Lakheraj land—Power of zemindars to create lakheraj, extent of—Bádsháhi tenure—Estate—Tenure, definition of—Liabilities of landholders.

Whether in the history of the human race there was or was not a time when every man used to raise his hand against every other man, small groups or bodies of men are ascertained to have been more or less aggressive towards each other in the past, and it is the religious instinct to which in the beginning has to be ascribed the formal imposition on men of the habits of self-control. The appropriation of a thing to the permanent use and enjoyment of an individual member of a community to the exclusion of others was not understood among savages, and with which archaic manners could scarcely have been conversant. There is little difference in this respect between some of the wild aborigines of the world and the ancient natives of Germania, where, Cæsar tells us, "Neque quisquam agri modum certum aut fines habet proprios"[1] (no one has any fixed portion of land or limits appropriated to him in ownership.) The development of the idea of property (स्वत्वम्), or ownership, has been the work of time, and gradually drew towards itself the incident of the free use and disposal of a thing. "Ownership," observes Jimutaváhana, "implies the absolute use of a thing according to the pleasure (यथेष्ट विनियोगः) of the owner, and arises out of law."[2] In the French Code[3] property is defined to be "le droit de jouir et disposer des choses de la

[1] De Bello Gallico L. 5 C. 22. [2] Mandlik's Vyávahára Mayukha, 31, note 1. [3] Art. 544.

manière la plus absolue, pourvu q'on n'en faisse pas un usage prohibé par les lois ou par les reglements." These are modern notions of property; but, in order to comprehend the religious character of property, one has to keep the two elements of enjoyment and disposal widely apart. It must not be supposed that the moment society passed out of the communal to the household stage, that very moment the right of individual ownership, much less the power of absolute disposal over a thing, came into operation. The household system of existence, which was the natural result of a reaction against communism, so accentuated the sentiment of separation, that one man came actually to believe that contact with another man's land outside the limits of his family hearth was an abomination to which religion gave the name of sacrilege[1]. Religion thus stood in the way of the disposal of a thing to another, and rendered alienation impossible. In a state of wild communism, any notion of privacy is entirely out of the question, and the very first effect of the establishment of the household fire showed itself in the absolute seclusion of domestic worship. The Manes and the Fire had to be fed in secret, a deity guarded the precincts of every house, and Vástu and Lar among the Bráhmans and the Romans came respectively to signify both a god and a house. Even at the present moment there is nothing so hateful to a "Gentoo" or "Hindu," as he is now called, as the renunciation of his family residence. "What is there," writes Cicero, in a comparatively sceptical age, "more sacred than the dwelling place of each man? There is his altar, there burns the sacred fire, there exists his religion and all things sacred to him."[2] The guardian deities, probably the images or the symbols of the ancestors of the ancients, were carefully placed in the interior of the house. The Roman *penetralia* were the sequestered part of a building where the household deities were installed, and so constructed as to shut out the gaze of strangers (penates quod penitus insidunt.)[3] The quadrangular character of orthodox "Hindu" habitations, much the same in Greece and Rome, with their courtyards and sancta, still point to the old religious belief, and it is thus that one is able to understand the meaning of the expression which was common among the old Greeks that the hearth, or the sacred fire, had taught men to build their houses.[4] The custom among the modern "Hindus" of performing the *homa* ceremony in the presence of the fire before entering a newly purchased house distinctly shows that religion forbade the use of other people's land or house. There is little doubt, bearing in mind the plan and architecture of ancient Roman houses, that the villages which Manu speaks of were but a conglomera-

[1] Manu, C. IV, 200—202.

[2] Pro Domo, 41.

[3] Cicero, De Natura Deorum ii, 2.

[4] "La religion a enseigné à bâtir une maison," observes M. de Coulanges. La Cité Antique 66.

tion of houses grown out of one single family. Following up the idea of the isolation of one house from another, Manu's injunction becomes plain and intelligible that there should be a belt of open space round a village, *i. e.*, a congeries of family groups, to serve as a boundary line, the sanctity of which it was necessary to guard with a temple.[1] To disturb the boundary line or break down a wall was in ancient times regarded as the most heinous of offences, and the legend of the death of Remus at the hands of his brother Romulus for having leapt over the boundary of the future city offers a significant illustration. In early times, upon the introduction of the settled form of existence, one of the things which was likely to be most useful to man was land. This land was consecrated to the hearth, and both the ancestors and the hearth were interested in its produce. To leave the land uncultivated was to starve the ancestors and the hearth, and to alienate it, even if strangers with their deeply-rooted abhorrence of other people's fire *(agni)* could be found to settle on foreign grounds, or the abodes of other people's ancestors, was to cut off forever the means of subsistence which was due to the *pitris* and the *agni*, the divine manes and the fire. Indeed, religion rendered the land so entirely one's own, that the owner could not be separated from it even by death, which, again, in ancient times, was conceived to be a kind of continuation of this life. The sacrifices were all attached to the land, and it is with the produce of the land that the sacrifices could be performed. "Religion," says Cicero, "prescribed that the wealth and the worship of each family should be inseparable, and the care of sacrifices should always devolve on him who takes the heritage."[2] The Latin word, *everriator*, means he who having taken the inheritance ought to perform the just rites to the deceased. Just as in Brahmanic law :—let him take the inheritance who offers the *pinda*, or the funeral cake. The heirs did not in those days take the property at the bidding of the ancestor, or by reason of his death; but by their own inherent title, dependent only upon their capacity to continue the line of descent. The Roman term, *hœres sui*, implies one who inherits of himself, and the *hœres* was at first regarded as the co-owner with the father. "Sui hæredes" are so called because they are family heirs, and even in the lifetime of their father are considered owners of the inheritance in a certain degree.[3] The Mitákshará recognizes the birthright (जन्माधीन स्वत्वम्) of the son. "Birth," says Vijnáneshwara, "is the cause of property," and following up the dictum of Gautama, "let ownership of wealth be taken by birth," the author lays it down as a settled point, "that property in the paternal or ancestral estate is by birth."[4] The daughter who by her marriage became a part of a strange fire and a strange house could necessarily claim no interest in the land. It would appear

[1] Manu C. 8, V. 237, 247—248.

[2] De Leg. II, 19-20.

[3] Justinian Lib. II, Tit. xiv, s. 2.

[4] Mitákshará, C. I, s. i, para. 23, 24 &c.

from what has come down to us of the speeches of the Greek orators that the Athenians did not recognize the heirship of the daughter.[1] Justinian thus observes on the old law—"because it seemed expedient that the law should be so ordained that inheritances should in future for the most part fall into the possession of males[2]." Gaius tells us in his Institutes that in those cases where the daughter succeeded, *i. e.*, when she was a maiden daughter and in the power of the father, she was merely an usufructuary, unable to give or sell without the consent of the brothers or the nearest agnates.[3] The principle is very nearly the same in Brahmanic law, the maiden daughter has preference over the other daughters, because she still belongs to the family or *gotra* of her father; but she is nevertheless a mere usufructuary, and can neither give nor sell without the consent of the immediate agnates of the father. Manu gives ample evidence that there was a time when not only females were wholly excluded from succession, but it was the first-born alone who was really esteemed to continue the personality of the father. "By the eldest son, as soon as born," observes Manu, "a man becomes father of male issue, and is exonerated from debt to his ancestors, such a son, therefore, is entitled to take the heritage.[4] But whatever may have been the power of the father, and how strict soever the rule of primogeniture, the head of the family for the time being was in the position of a trustee or depositary with such right over the property as was consistent with the interest of not only the dependant members (भृत्याः) of the family, but of the agni, the manes and even those that were yet unbegotten, all of whom were considered to be cestuiquetrusts or beneficiaries in the inheritance.[5] "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support, and the dissipation of their hereditary maintenance is censured,"[6] or, as the author of the Mitákshará reads the responsum of Manu, "no gift or sale shall be made of ancestral property."[7] In the Mitákshará,[8] an anonymous writer is cited who warns us that in regard to immoveable estate sale is not allowed. "Though immoveables and bipeds[9] have been acquired by the man himself, there is no giving away or selling them without

[1] La Cité Antique 79. *Vide*, Aristophanes on *Birds*, 1653-1654.

[2] Lib. III, Til. ii, s. 3.

[3] Gaius I, 192.

[4] Manu C. IX, vv. 106-110.

[5] "The support of persons who should be maintained is the approved means of attaining heaven; but hell is the man's portion if they suffer, therefore let the master of a family amply maintain them." Jimutavahana, C. II s. 3.

[6] Jimutaváhana, C. I, s. 45.

[7] Mitákshará, C. I, s. 1, cl. 27.

[8] C. I, s. 32.

[9] C. II, s. 1, p. 47.

convening all the sons." We read in Leviticus[1] that the sale of land was forbidden among Jehovah's chosen people. It appears from some of the passages in Plato and Aristotle, that the sale of land was formally prohibited at Sparta.[2] The laws of Solon, if they did not directly forbid the sale of property, inflicted on the vendor the loss of citizenship,[3] bearing in this instance a close resemblance to the Brahmanic doctrine which, without annulling the fact of sale, attached a heinous sin to the vendor. "Therefore since it is denied," observes Jimutaváhana,[4] "that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null and void; for a fact cannot be allowed by a hundred texts." This is the text to which, under the designation of factum valet, English lawyers would give wide extension. Jimutaváhana introduced the doctrine with the manifest purpose of giving, as we should now say, security to innocent purchasers for value. The first solvent that was applied to the indissolubleness of property in Brahmanic society was the principle of equal succession of all the sons to the patrimony. In Rome, at the epoch of the XII Tables, the division of the patrimony, or separate possession by the brothers, took place with the performance of a sacramental act. "Where there were several brothers," observes M. de Coulanges, "it was no doubt permitted to them to divide the heritage; but upon the condition that a new religious ceremony would be accomplished."[5] This religious ceremony was, as M. Ortolan suggests, probably the origin of the conveyance by mancipatio.[6] In Manu's time the division of the inheritance took place among the brothers on a religious ground. "Let the father alone," say the Institutes "support his son, and the first-born his younger brothers, and let them behave to the elder according to law, as children should behave to their father[7]." Then follows this injunction, "either let them thus live together, or if they desire separately to perform religious rites, let them live apart, *since religious duties are multiplied in separate houses*: separation is therefore legal and even laudable[8]." One cannot fail here to notice the device by which growing ideas of convenience were reconciled with the old belief. The institution of *peculium castrense* and the fiction of *quasi castrense*, or the spoils obtained in war, and the emoluments of state offices, were important elements in the original conception of separate ownership in Rome as apart from family possessions, as the gains of science or learning were the means of establishing separate ownership among the members of a family in Brahmanic India.[9] It is obvious

[1] Chap. 25, v. 23.
[2] Cité Antique.
[3] *Ibid.*
[4] C. II, s. 30.
[5] Cité Antique, 74.
[6] Prichard's Ortolan, 615.
[7] C. IX, 108.
[8] Ibid. V, 111.
[9] विद्याधनन्तु यत्‌यस्य तत्तस्यैव धनंभवेत् । Manu, C. IX, 206.

that before alienation or absolute disposal of a thing by an individual member of a family could be contemplated, the fact of distinct ownership had to be clearly recognized. It would be necessary to establish the absolute ownership in the father before he would be able to exercise, at his own pleasure, the right of transfer. In Rome, it is well known, no one could will away any property except with the permission of the assembly of the tribes.[1] Vijnáneshwara lays down in the most stringent language that a father is not competent to sell any property, whether ancestral or self-acquired. Jimutaváhana was probably the first among Brahman sages to inculcate the doctrine of the absolute and separate ownership of the father. Founding his doctrine on a text of Manu, "after the death of the father and mother, the brothers being assembled, must divide equally the paternal estate; for they have no power over it while the parents live," the author refutes the principle of co-equal right of the sons with their father in the family property, and proceeds to enact "that sons have no ownership while the father is alive."[2] Compare with this the later maxims of the civil law "nemo est hæres viventis." Step by step, property lost its religious character. The author of the Mitákshara in a long disquisition attacks the theory of the religious basis of property, and concludes with the observation, "that property is a secular institution; for it affects transactions relative to worldly affairs."[3] In Rome, the growth of other species of wealth, and the struggle between economy and luxury encouraged the transfer of land, and commerce, conquest and coin, lent in turn their assistance to the free alienation of property.

In England, land still descends as a rule to the eldest son. This is said to be a relic of the feudal system under which land was tied up much after the manner of ancient times. If the religious instinct did not act with the same energy in England as it did in old India and Rome, its influence could not have been wholly unfelt by the early Teutons and Saxons. Religion first gave the law of primogeniture, and excluded females from the line of succession. The Scandinavians in their own home are said to have observed these forms, and if, as Du Cange suggests, the custom of primogeniture was introduced by the Normans from Scandinavia,[4] it goes a great way to confirm the belief that primogeniture was anterior to feudal customs, and its prevalence among the Indo-Germanic races was due to the old religious instinct. The Salic Germans, it is well-known, excluded females from succession, and there is a record, of which I am unable to find the reference just now, that a king, named Pharamond, who established himself in Gaul, enacted in his code that no portion of the inheritance should pass to a female (nulla portio hæreditatis transit in mulierem). Judging from the writings of Tacitus and Cæsar, some sort of a familia must have been

[1] Maine's Ancient Law, 199.

[2] Dáyabhága.

[3] Mitákshara, C. I.

[4] 1 Hallam's Middle Ages, 176, note.

known to men who afterwards became distinguished in history as the barbarians, and the chief of a tribe by virtue of kinship would thus be enabled to draw to himself the power of the paterfamilias. The subjection of the members of a family to the father would by an easy transition be converted into the subservience of a body of kinsmen to the domination of the eldest agnate, and lead in the course of time to that servile attachment which came at last to be due to the feudal chiefs from their *comites* or comrades. The Saxon and the Teuton bore in the bosom of their society the germ which fed by the lust of conquest, and the exigencies of adventure and foreign depredation, developed into the feudal system and the establishment of the royal and the noble castes. The Hlaford, or the lord, was the bread-giver, and the thanes were their immediate dependants. The vassals were the lords' men, and owed homage for the benefits they received from the land which belonged to the lords, the king being the highest lord of all, or the lord paramount. The custom of *mercheta*, from which the law of Borough English, or the succession of the youngest son in preference to all the others, still prevalent in some parts of England, is supposed to have been obtained, reveals a state of the most abject slavery that the human mind could conceive.[1]

Religion raised the eldest son, because he was the first to bring spiritual comfort to an anxious parent; the cupidity of war proclaimed the pre-eminence of the firstborn, because he would be the foremost to hold arms; and thus the highest kind of feudal tenure was the tenure by knight service. One of the reasons given for this rule of primogeniture is the indivisible nature of the feudal service; but the most prominent reason, doubtless, is the early fitness of the firstborn to fulfil the onerous duties of a military tenure. Females were in consequence excluded from succession, and a father was held incapacitated from succeeding to the estate of his son on the supposition that he would be too infirm at the time for military work. It is curious to note that it was not until several years after the Supreme Court had come to administer justice in Calcutta that the English law allowed the claim of the lineal ascendants to the inheritance that may have been left by their descendants,[2] and the orthodox reason for the exclusion of parents from succession, namely, that a heritage like a falling body cannot ascend, ceased to have any operation.

I will give you the picture of a feudal society as delineated in its simplest form by Guizot[3]: "First of all let us take feudalism in its most simple, primitive and fundamental element; let us consider a single possessor of his fief in his domain, and let us see what will become of all those who form the little society around him. He establishes himself upon an isolated and elevated spot, which he takes care to render safe and strong. There he constructs what he will call his

[1] Stephen's Commentaries, i, 216.

[2] 3 and 4 Will. IV, C. 106.

[3] Civ. En. Europe, 102.

castle. With whom does he establish himself? with his wife and children; perhaps with some freemen, who have not become proprietors; these attach themselves to his person, and continue to live with him at his table. These are the inhabitants of the interior of the castle. Around and at its foot, a little population of colonists and serfs gather together, who cultivate the domain for the possessor of the fief. In the centre of this lower population, religion plants a church, it brings hither a priest." And much in the same way does Manu depict a royal domain: "Let him (the king) fix his abode in a district containing open champaign, abounding with grain, inhabited chiefly by the virtuous, not inflicted with maladies, beautiful to the sight, surrounded by submissive mountaineers, a country in which the subjects may live at ease. There let him reside in a capital, having a fortress. * * * * * With all possible care let him secure a fortress of mountains. * * * * In the centre of it let him raise his own palace * * * completely defended; he must appoint also a domestic priest, and retain a performer of sacrifices who may solemnize the religious rites of his family and those performed with three fires."[1] The Kshatrya king received his annual revenue from his whole dominion through his collectors, and was enjoined to act as a father to his people, or become *parens patriæ* in the feudal language. The administration of the country for fiscal purposes was left in the hands of a graduated series of officers who represented the sovereign in due degree. "Let him," says Manu, "appoint a lord (अधिपतिः) of one town with its district, a lord of ten towns, a lord of twenty, a lord of a hundred and a lord of a thousand; such food, drink, wood and other articles as by law should be given each day to the king by the inhabitants of the township, let the lord of one town receive as his perquisite, let the lord of ten towns enjoy the produce of two plough lands, the lord of twenty that of ten plough lands, the lord of a hundred that of a village or small town, the lord of a thousand that of a large town." Compare this with the English socage tenure or holding of land by the gift of agricultural produce, or afterwards its equivalent in money—the word *Soc* is said to signify a plough. The institutes of Timur, which formed the basis of the Mogul law in Mussulman India, directed the division of the produce of the land in certain proportions between the sovereign and the husbandman.[2] Having regard to the tendency in former days to render the tenure of office perpetual in a family, the lords of the ten, twenty, hundred and thousand towns must have come to possess in the time of the Mogul rule a permanent and hereditary right to a certain share of the soil, and ultimately to be recognized under the various names of Zemindars, Taluqdars, Chowdhries &c. Akbar left with the zemindars the entire management of their estates, and concluded a settlement of the revenue with them,

[1] Manu, C. VII, vv. 70—78.

[2] 3 Harington's Analysis.

assigning to them a portion of the land or its produce for their immediate use and subsistence under the denomination of *nánkar* or bread allowance. Akbar was thus the Hlaford or bread-giver, and the scheme of his minister Todar Mull remained in force with little or no material alteration from 1582 to 1658. The preservation of the internal peace of their districts was one of the duties of the zemindars. They were also obliged to attend and assist their sovereign for opposing and suppressing rebellion. The office of zemindar was transmitted by inheritance, and the raiyats looked up to the zemindars as their hereditary patrons and governors.[1] Notwithstanding the series of oppressions which Aurangzebe inaugurated, and the anarchy and misrule which followed his death, the zemindars, it would seem, retained their rights and privileges to the last, and shortly after the accession of the British, Ghulam Husain Khan, described as a son of the late Nizam of Behar, is reported to have said in answer to a certain question: "it has been the custom for the Emperors to appoint a successor to the zemindar on his demise. The person so invested pays a *nuzrána* (a donation) to Government, proportionate to his ability. The eldest succeeds in the first instance, and after him, the eldest of his sons. True, no person can possess anything without the consent of the Emperor, whose power is despotic; yet, except in the instance of gross contumacy, the line of inheritance has never been known to have been broken."[2] The zemindar used to receive his investiture from the Emperor or his delegate and thus became his man or vassal (خادم); the word *khidmat* (خدمت), which occurs in the zemindari *sanads* of those days, means service, and clearly bears a sort of resemblance to the feudal homage.

Harington[3] thus describes the position of a zemindar under the Mogul system:—"The *zemindar* appears to be a landholder of a peculiar description, not definable by any single term in our language. A receiver of the territorial revenue of the State from the *rayats*, and allowed to succeed to his zemindari by inheritance; yet in general required to take out a renewal of his title from the sovereign, or his representative on payment of a *peshkush*, or fine of investiture to the Emperor, and a *nuzerrána* or present to his provincial delegate, the Nazim. Permitted to transfer his zemindari by sale or gift, yet commonly expected to obtain previous special permission. Privileged to be generally the annual contractor for the public revenue receivable from his zemindari; yet set aside with a limited provision in land or money, whenever it was the pleasure of Government to collect the rents by separate agency, or to assign them temporarily or permanently by the grant of a *jageer* or *ultamgah*. Authorized in Bengal to apportion to the pergunnahs, villages, and lesser divisions of land within his zemindari, the abwab or cesses, imposed by the subadar, usually in some

[1] Harington's Analysis.

[2] 3 Harington's Analysis, 314, *et seq.*

[3] 3 Harington's Analysis, 400.

proportion to the standard assessment of the zemindari established by Todar Mull and others; yet subject to the discretionary interference of public authority, either to equalize the amount assessed on particular divisions, or to abolish what appeared oppressive to the *rayat*. Entitled to any contingent emoluments proceeding from his contract during the period of his agreement, yet bound by the terms of his tenure to deliver in a faithful account of his receipts. Responsible, by the same terms, for keeping the peace within his jurisdiction; but apparently allowed to apprehend only and deliver over to a Mussulman Magistrate for trial and punishment.[1]"

Thus, whether in Asia or Europe, the feudal system in one form or another is to be met with everywhere, and the germ of feudal supremacy, though that supremacy is matured by foreign conquest and best developed under foreign domination, is to be looked for in the old family system. The father is at first the dominus of the land and children, next the elders or the heads of a body of kinsmen, then the head of the clan, and lastly we have a king or sovereign.[2] In Russia, the aggregation of inhabitants of a village possessing in common the land attached to it, is called the *Mír* (community). The patriarchal family

[1] 3, Harington's Analysis, 253. Form of a sunnud for a zemindari, granted in the time of Akbar Shah: "Be it known to the present and future mutsaddies, chowdhries, canoongos, talookdars, ryots and husbandmen of Pergunnah —— belonging to Chuklah—dependent on the Soobah of Bengal, that the office of zemindar of pergunnah —— has been bestowed from the commencement of the year —— on —— agreeable to the endorsed particulars, on condition of his paying —— mohurs. It is required that having performed with propriety the duties of his station, he deviate not from diligence and assiduity in the smallest degree; but observing a conciliatory conduct towards the ryots and exerting himself to the utmost in punishing the refractory and expelling them from the zemindari, let him pay his revenues into the Treasuries at the stated periods; let him encourage the ryots in such a manner that the signs of an improved cultivation, and improvement of the country, may daily appear, and let him keep the high roads in such repair that travellers may pass and re-pass in perfect safety. Let there be no robbery or murder committed within his boundaries. Should any one, notwithstanding, be robbed or plundered of his property, let him produce the thieves with the stolen property, and after restoring the latter to the rightful owner, let him assign the former over to punishment. Should he fail in producing the parties offending, he must himself be responsible for the property stolen. Let him, moreover, be careful that no one offend against the peace of the inhabitants by irregularities of any kind Finally, let him transmit the accounts required by him to the Huzoor under his own and the Canoongos' signature, and after having paid up his revenues completely to the end of the year, let him receive credit for the *mazcoorat* agreeably to usage. Let him abstain from the collection of any of the *abwab* that have been prohibited by Government. It is also required by the aforesaid *mutsaddis* that having acknowledged the said person as zemindar they consider him as invested with the powers and duties appertaining to his station. Let them deviate not therefrom.

[2] Cyning, by contraction *King*, comes from the same root as the word *cyn* or *kin*. And the connection is not without an important meaning. The King is the representative of the race, the embodiment of its national being 1 Freeman's Norman Conquest, 78.

is the basis of the commune, and the members of the *Mír* are generally considered as descended from a common ancestor. There is usually neither succession nor partition. The house, the garden, the agricultural implements, the stock and the produce remain the collective property of all the members of the family. No one thinks of claiming a separate share. On the death of the father of a family, his authority and administration devolve on the eldest member of the house. In some districts on the eldest son; in others the eldest brother of the deceased, provided he lives under the same roof. In some parts too the members of the family elect the new chief. The head of the family is called Khozain (the administrator), or Bolshak (the great one). In the Russian family as in the Russian state, the idea of authority and power is mixed up with that of age and paternity, and the Emperor is the father, or the sterosta (the old).[1]

There is much in the foregoing description to call to the mind the association of a Brahmanic household, village (ग्रामः), and state. The head of a family is the Karta (कर्त्ता = administrator). The Mandal, or the Pradhána, is the chief, the great one, or the headman of a village, and the king is the father (पिता). There can be little doubt that tenures in primitive times, at all events among the Indo-Germanic people, were tenures held in common by a group of kinsmen with the eldest male member of the family at the head, such, for instance, as, perhaps, the original of the frérage or brotherhood tenure of Mediæval France,[2] and the curious Bhaiyáchárá tenure (fraternal institution) which still exists in certain parts of India, notably in Bundelcund. In the Bháiyáchárá tenure, the village is divided into *thokes*, and each *thoke* is subdivided into *behris*. The *assami*, or cultivator, pays the *behriwar*, who in his turn pays the thokedar, who again pays the lumberdar or *mokhia* (the principal man).[3] From such a system the transition to territorial sovereignty is not difficult, and it can be readily imagined how in course of time all this would lead to the formation of a landed aristocracy which constitutes a marked trait of a feudal government.

There is every reason to suppose that the feudal system[4] was immediately derived from the scheme which the barbarian conquerors of the Roman Empire adopted in the allotment of lands in the conquered territories. The chief of the clan appropriated the best lands to the use of himself and his retainers, and the natives were either left in possession of the remainder or retained as serfs or cultivators. "When these tribes from Germany, and the neighbouring countries," says Hallam, "poured down upon the Empire, and began to form permanent settlements, they made a partition of the lands in the conquered

[1] M. De Laveleye's Prim. Prop.
[2] 1' Hallam's Middle Ages, 176.
[3] Field's Regulations.
[4] Austin's Jurisprudence:—"The convenient device of conquerors."

provinces between themselves and the original possessors. The Burgundians and Visigoths took two-thirds of their respective conquests, leaving the remainder to the Roman proprietor. Each Burgundian was quartered under the gentle name of guest, upon one of the former tenants, whose reluctant hospitality confined him to the smaller portion of his estate. The Vandals in Africa, a more furious race of plunderers, seized all the best lands. The Lombards in Italy took a third part of the produce. It is clear that the Franks occupied by public allotment or individual pillage a great portion of the lands of France."[1] The position of a handful of conquerors in the midst of a vast native population is at all times one of hazard and suspense, and the Vandals and the Visigoths would naturally endeavour to secure themselves against sudden insurrection by forming the closest alliance between the members of their own race. Moreover, the mutual animosities between the rival bands of barbarians[2] would furnish an additional inducement to maintain a perpetual attitude of war in order to encounter occasional irruptions from without. The noblest service under which land was held in those days was, therefore, service in the field of battle. Even prior to the Conquest, which has been fixed as the epoch of the introduction of feudalism, all lands in England had been subject to the *trinoda necessitas*, or three kinds of services, namely, the attendance on the King in his military expeditions, the repairing of castles, and the building of bridges which, it is said, were all of a feudal character.[3] It is the cardinal principle of the Feudal System that "all the lands and tenements in the hands of subjects are holden mediately or immediately of the Sovereign."[4] The word "tenure" is derived from "*tenere*," to hold, and a tenure may be taken to mean *land held of another upon certain conditions.* The word "feudal" has been variously explained. M. Thierry's etymology, however, seems to have met with general approval. According to that authority, *feh*, *i. e.*, fee or pay, and *odh*, property, is the true root.[5] The theory evidently was that all lands were given on the condition that the grantee should perform certain services. Of these services the most honorable was that of *knight-service.* This was the tenure by which the King granted out fiefs[6] to his followers, who in their turn provided for their own military retainers by grants of land. The fiefs were also called benefices, inasmuch as the lands were held for consideration of service or benefits.[7] As, on the one hand, lands were held by certain persons from the King upon certain ser-

[1] Middle Ages, I, 147-148.

[2] *Ibid.*, I, 369.

[3] I Reeve's His. Eng. Law. Crabb's His. Eng. Law, 9.

[4] Coke upon Littleton, Cap. 1, s. 1.

[5] Lettres sur l'Hist. de France, Lettre X.

[6] Fief, feoffment, feud, are all connected with the root *feh.*

[7] Hallam's Middle Ages, I, 159.

vices, so by a process of sub-infeudation lands were held by others from the former on condition of the performance by them of similar services. These services were of various descriptions. The meaner services by which land was held were such as were rendered by foresters, huntsmen, falconers, farriers, cooks and similar officers. On the grant of a fief, the tenant was publicly invested with the land by a symbolical or actual delivery, termed livery of seisin. He then did homage (*homagium*) which was a service of submission rendered by the tenant to the lord, and is derived from *homo*, a man, because in performing it, the tenant uttered the formula, "I become your man" (*Je deveigne votre homme*),[1] the lord then kissed his vassal on the cheek and received the oath of fealty (fidelitas). 17, Edw. II, St. 2 thus prescribes the method of doing homage and fealty in the case of a freeman:—"I become your man this day forth for life, for member, and for worldly honour, and will owe you faith for *the lands I hold of you*, saving the faith I owe unto our lord, the King." If the tenant did homage to any other than the chief lord, he was to add "and to mine other lords". When he did fealty he was to hold his right hand upon a book and say, "Hear you, my lord—, that I—, shall be to you, both faithful and true, and will owe my fidelity unto you *for the land that I hold of you*, and lawfully shall do such customs and services as my duty is to you, at the terms assigned. So help me God and all his saints."[2] The actual ownership of the land resided in the lord, and the interest of the tenant was dependent on the lord's pleasure, and scarcely extended beyond life. The feud or fief was a mere gift, and to give (*dare*), or grant, is still the effective word in the old form of conveyance, namely, feoffment. A feud for life afterwards came to be called a freehold, or land held in consideration of services deemed worthy of freemen, such as the profession of arms as opposed to the holding of land by the performance of base or inferior services. A sense of convenience, no less than the apathy of the wealthy lords, gradually led the way to the conversion of these freeholds into estates of inheritance. It should be noted here that by a law of the reign of Alfred the Great, the alienation of ancestral land was prohibited.[3] A law of Henry I, who is related to have restored to some extent the old Saxon laws, enacts: "Let him give his own acquisitions to whomsoever he pleases, if, however, he should have Bocland which his parents may have given him, let him not transmit it beyond his own relations (*acquisitiones suas det cui magis velit, si Bocland autem habeat, quam ei parentes sui dederint, non mittat eam extra cognationem suam.*)[4] This provision which enabled a man to disappoint his children of lands *purchased* by him was qualified in the time of Henry II, when it was laid down that a man should be free to aliene only a

[1] Littleton L. 1, c. iv, s. 85.

[2] 2 Reeve's His. of English Law, 311, 1 *Ibid* 277.

[3] I Reeve's His. of English Law, 43 and 104.

[4] Reeve's His. of English Law: Glanville, Lib. 7, c. 4.

part of his own acquisitions or land purchased by him so as not to disinherit his own children (*filium suum hæredem non exhæredare*). But if he had neither son nor daughter, he might then aliene a part or even the whole in fee. No one, however, was permitted to give anything by will; but, it seems, that gifts in *maritagium* were allowed even of lands of inheritance. "Every freeman," says Glanville, "might give part of his land with his daughter whether he had an heir or not."[1] A person was also at liberty to give a part of his freehold to a monastery in free alms. Originally land of inheritance appears to have been granted in one or other of these two forms. It was granted either to a man and his wife and the heirs of their body, or to a man and his heirs generally; and in either case, the ancestor and the heir took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial interest in the land, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property."[2] The device of sub-infeudation, however, which was early hit upon, frustrated to a great extent the expectations both of the heir as well as of the original grantor. By this means the original grantee could give away the land in perpetual use to another at a great personal advantage to himself, and leave but a small rent or return for the heirs. He could, besides, by becoming the intermediate lord, deprive the original grantor of wardship and marriage, the two most important incidents of a feudal tenure. In the year 1284 such mode of alienation had become prevalent, and the object of 13, Edw. I, c. 1 was effectually to put a stop to the practice in the case of gifts to a person and the heirs of his body. This is the statute known as *De donis conditionalibus*, or concerning gifts upon condition: "When any giveth his land to any man, and his wife with such conditions expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall return to the giver and his heir, or when one giveth land to another, and the heirs of his body issuing—in all the cases aforesaid after issue begotten of body, such feoffees had power to aliene the land so given and disinherit their issue, *contrary to the form expressed in the gift*. And further whereas by default of issue of such feoffees the land so given ought to return to the giver or his heir, the donor had been barred of the reversion of such lands which was directly repugnant to the form of the deed—the form of the deed should be henceforth observed, so that they to whom the land was so given *under condition* shall not have power to aliene the land so given in deprivation of the heir or the donor." A writ was given to the heir to recover the estate in case of alienation, which was known as the writ of formedon, or *per formam doni*. In the case of gifts to a man and his heirs generally, the Barons, likewise, laboured hard to restrain their tenants from the practice of sub-infeudation, and in the 18th year

[1] Reeves' His. of English Law.

[2] Burgess *v.* Wheate, 1 Wm. Blackstone, 133. William's Real Property, 18.

of Edw. I, the statute of Westminster the Third was passed, better known as *Quia Emptores* from the first two words of the statute: "*Quia Emptores terrarum et tenementorum de feodis magnatum et aliorum in prejudicium eorundem .....*": "it shall be lawful to every freeman," in the language of the statute, "to sell at his own pleasure his lands and tenements or part thereof, so nevertheless that the feoffee shall hold the same lands or tenements of the same chief lord of the fee and of the same services and customs as his feoffee held them before." Thus the Barons were no doubt successful in putting an end to the creation of intermediate *lord-ships;* but the consequence was the conversion of clandestine alienation into open transfers, and the grantees were left absolutely independent of their heirs in the disposal of their property. In the same year (C. 18), land which was hitherto unattachable in execution, as we should now say, of decrees for debt, was allowed to be taken by the Sheriff to the extent of a moiety. By 1 Edw. III, C. 12 tenants in capite, or freeholders of the king, were permitted to alienate on the payment of a reasonable fine. 27 Edw. III C. 9 provided that land was wholly liable to be taken in execution of a decree for debt. It would appear that the practice of devising lands by will was practically recognized by 44 Edw. III, C. 33. By the statutes 32, 34, 35 of Henry VIII, who was known to be more favourable than his predecessors to the removal of those burdens which impeded the transfer of landed property, persons were enabled to devise the whole of their lands and tenements in socage. Socage lands were lands held by non-military, or agricultural, services. The incidents of this tenure were much less burdensome than those of knight service. They were free from the exaction of wardship and marriage which meant, firstly, that if the heir of the tenant was under age, the lord had, under the name of wardship, the custody of the body and lands of the heir, without being subject to the obligation of rendering an account of the profits, till the age of 21 years in males and 16 in females, and secondly, that the lord was vested with the right of disposing of the infant wards in marriage, so that in case of their refusing a match that was suitable in the estimation of the lord, the wards ran the risk of forfeiting to the lord a sum of money equal to the value of the marriage, or what the suitor was willing to pay down to the lord as the price of marrying his ward, and double the market value was to be forfeited, if the ward presumed to marry without the lord's consent. 12 Car, II, C. 24 abolished these, and other, onerous incidents imposed on lands held by military tenure. The principal and original purpose of these tenures was to secure an efficient military force for the protection of the realm, but the frenzy inspired by the Crusades had early given rise to money commutations which, under the name of scutage, came to be accepted in lieu of personal service. All that remained of the incidents of such a tenure at the time of the statute were the pecuniary burdens of wardship and marriage, and certain restraints upon alienation. These were all done away with by the statute, and all sorts of tenures

of inheritance (except copyhold tenures) whether held of the king or others were turned into common socage tenure, and all that is now due to the lord on account of a freehold of inheritance is one year's quit rent on the death of the tenant. Homage is unknown, and the oath of fealty has become wholly obsolete.

We will next consider the relation of the sovereign to the soil in India under the different dynasties of rulers. It appears that the Kshatrya kings were the lords paramount of the soil;[1] but their system of land revenue was exceedingly moderate. All that the ancient Rajahs seem ever to have exacted was a twelfth, an eighth or at most a sixth proportion[2] of the produce of the lands according to the difference of the soil and the labour necessary to cultivate them, and subject to this small payment the possessors were authorized to sell or alienate at pleasure. "Let him (the king) not cut up his own root by taking no revenue," thus runs a text of Manu, "nor the root of other men by excess of covetousness; for by cutting up his own root and theirs, he makes both himself and them miserable."[3] The Mussulman sovereigns likewise constituted themselves the lords paramount of the soil, and their system of land revenue, afterwards elaborated by Todar Mull in the reign of Akbar, appears to have been founded on the basis of the institutes of Timur, which was to divide the produce of the land in certain proportions between the sovereign and the husbandman. "I ordained," such is the enactment of Timur, "that the revenues and the rents should be collected in such a manner as might not be productive of ruin to the subjects or of depopulation to the country. I ordained that in every country that should be subdued (to the inhabitants of which charters of safety and security should be given) the produce and revenue of that country should be inspected. If the subjects were satisfied with the old and established taxes, I ordained that those taxes should be confirmed, agreeably to the wishes of the subjects, or if not, that they should be determined according to the regulation. And I ordained that the duties should be determined in proportion to the produce of the cultivated land; and that the taxes in the produce of those lands should be affixed and ascertained. Thus, first, that the cultivated ground of the subject which should be made fertile by the water of canals or by springs, rivulets or rivers (if these waters flowed perpetually and continually) should be superintended by the officers of the Crown; and that of the amount of the produce of those grounds two-thirds should be allowed to the possessor thereof, and one-third be paid to the royal treasury * * * ."[4]

Upon the assumption of sovereign power by the East India Company, the

[1] Manu c. 7, v. 128. Also c. 8, v. 39: भूमेरधिपतिर्हि सः.

[2] Manu c. 7, v. 130.

[3] Manu c. 8, v. 139.

[4] Harington's Analysis.

policy on which a settlement should be made with the landholders came under discussion as early as the year 1775. 24 Geo. III, Cap. XXV was passed, and by section 39 of that statute the Court of Directors were required to give orders "for settling and establishing upon principles of moderation and justice according to the laws and constitution of India, the permanent rules by which the tributes and rents and services by the Rajahs, Zemindars &c. should be in future rendered and paid to the United Company." With a view to carry into effect the intention of the legislature, the Court of Directors issued orders for a full investigation of "the jurisdiction, rights and privileges of zemindars, talookdars and jagheerdars, under the constitution and customs of the Muhammadan or Hindoo Government; and what were the tributes, rents and services, which they were bound to render or perform to the sovereign power, and, in like manner, those from the talookdars to their immediate liege-lord, the zemindars; and by what rule or standard they were or ought severally to be regulated."[1] The Court were at the same time of opinion that the spirit of the Act would be best observed by fixing a permanent revenue on a review of the assessment and actual collections of former years; and by forming a settlement in every practicable instance with the landholders; establishing at the same time such rules as might be requisite for maintaining the rights of all descriptions of persons under the established usages of the country. This was the beginning of the Permanent Settlement, from which arose what has since been known as the zemindari tenure. Long and important debates have been carried on to determine the question as to the proprietory right of the zemindar to the soil. The question, no doubt, is one of some difficulty; and the difficulty seems to have been enhanced by mixing up political with legal notions of proprietory right. Without attempting to solve the question,[2] which for all practical purposes has become wholly unnecessary, one might suggest the point of view from which the question could be usefully studied. We know that in early times the eldest brother was the chief manager or *Karta*, that in a joint family the eldest agnatic male relation has to some extent maintained his ancient position even in modern times, and instances are not wanting where the infant and female members of a joint family are quietly pensioned off, if not wholly excluded from the patrimony, in order to secure the ambitions designs of a powerful *Karta*, who, thereupon, becomes the father of a new house; then, it is evident that in the time of Manu, the lords of villages, who were quartered upon the community, were entitled to receive the yield of a certain number of ploughs, nor can there be any doubt that in times of limited competition, offices under the state have a tendency to become hereditary, it is, therefore, by no means unreasonable to suppose that these lords and their descendants would gradually form into a landed class:

[1] 3 Harington's analysis.

[2] System of land tenure in India, (Cobden Club Essays), p. 150.

such considerations as these may enable one to form a generally correct idea of the true status of the old zemindar. The rights of the latter class, however, to the rent-yielding domain, whatever the extent of the rights may be, were not mere contractual rights. These men claimed a share of the produce by virtue of a position founded rather upon a political than a legal basis, and upon their dignity as *parentes patriæ* rather than upon the exchange of *potta* and *kaboolyat*.

Under the terms of the Permanent Settlement, the zemindar or the person with whom the Government arranged for the regular payment of the revenue, undertook to pay a certain sum of the collections which at the time of the settlement appeared on the rent-roll, and this amount was fixed without increase or diminution for all times. "As respects revenue," observes Sir George Campbell, "the zemindars were subjected to immediate terms much harder than those which are now accorded; *the Government demand was fixed at ten-elevenths of the then rent-roll.*"[1] Whatever that may be, the zemindars are left free to alienate or dispose of their property in any way they like, they are at liberty to sub- or sub-infeudate their possessions,[2] and may, when occasion arises, enhance the rent of a certain class of raiyats when the productive power of the holding is found to increase upon certain conditions, and raise the rent at will with respect to the ordinary class of raiyats. The zemindari system was introduced into Bengal, Behar, Orissa and a portion of the North-Western Provinces. In Bombay and Madras (a portion of which was permanently settled), there is the raiyatwari system. Under the latter system the Government deals directly with the raiyats. The zemindars and polygars were considered to be no better than robbers and tyrants from whom the Company had delivered the people, and they were as much as possible put aside. In the Panjab, the settlement is made with the village communities; but practically the settlement made with a community is very nearly raiyatwari. The normal tenure of the North-Western Provinces may be said to be that of moderate proprietors of fair position and character, with many raiyats under them who possess a right of occupancy with fair rent—the settlement is made for a large number of years at the expiration of which the Government is at liberty to make new terms.[3] Thus, the British Government is, like its predecessors in India, the lord paramount of the soil, and every bigha of land is answerable for the Government revenue,[4] which is regarded as the first charge on the land. The Government by its prerogative of *parens patriæ* will take over charge of all

[1] System of Land Tenure in India (Cobden Club Essays).
[2] Reg. I, 1793, s. IX, Art. 8. Reg. VIII of 1819, s. 3.
[3] System of Land Tenure in India, (Cobden Club Essay).
[4] Forbes *v.* Mir Mahomed Hossain, 12 B. L. R., P. C., 210.

estates, the proprietors of which may happen to be incapable by reason of sex, minority, or physical incapacity to manage their estates, and may also take over the lands of infants and others upon the application of the Civil Court in certain cases.[1] Under the stringent words of the Act no ward is able to make a valid adoption without the sanction of the Government. "The property of an infant, whether by descent or otherwise," observes Manu, "let the king hold in his custody, until the owner shall have ended his infancy. And equal care must be taken of women without kindred."[2]

The Government in its capacity of *parens patriæ* will also take charge of such lands which have been granted for the support of establishments for charitable purposes, these lands vesting in the Board of Revenue. Under Regulation XIX of 1810, s. 11, the general superintendence of all lands granted for the support of mosques, Hindu temples, colleges, and for other pious and beneficial purposes, and of all buildings, such as bridges, serais, kuttras and other edifices, was vested in the Board of Revenue, the Collector of the Zillah being *ex-officio* one of the agents. A distinction, however, was made in 1863 between secular and religious charities, and Act XX of 1863, s. 21 provided that Government would have nothing to do with lands given for religious purposes, and when lands were given partly for religious and partly for secular purposes, the latter alone should be taken up by Government.

Under the provisions of the Land Acquisition Act,[3] Government may compel private landowners to sell their lands to Government at a fair valuation.

The shore of the open sea or the strip of land between high and low water mark is vested in the Crown,[4] as well as the margin of tidal rivers and their beds.[5] The sovereign has also the control of all treasure-trove, or anything of any value hidden in the soil, or in anything affixed thereto. Under s. 16, Act VI of 1878, "the Collector may acquire on behalf of the Government the *treasure* or any specified portion thereof by payment to the person entitled thereto of a sum equal to the value of the materials of such treasure or portion together with one-fifth of such value." With this modification, all treasure-trove in this country practically belongs to the finder or the finder and the claimant by analogy to the Roman law.[6] In England, such treasure belongs to the Crown.[7] "Of a treasure anciently reposited under ground," observes Manu, "which any other subject of the king has discovered, the king may lay up half in

[1] The Court of Wards Act (Act IX of 1879, B. C.)

[2] Manu, c. 8, v. 27 and 28.

[3] Act X of 1870.

[4] 2 Stephen's Commentaries, 521, 5th Edition.

[5] Bengal Regulation XI, 1825.

[6] Just. Inst. ii, 1, 39.

[7] 2 Stephen's Commentaries, 566, 5th Edition.

his treasury, and of old hoards and precious minerals in the earth, the king is entitled to half by reason of his general protection."[1] The sovereign is also the *ultimus hæres*, and as such takes, by escheat in feudal language, the property of those who have died without disposing of it, and have left no heir behind them.[2] "On failure of heirs," in the words of Manu, "the king may take."[3] The exception in the case of property left by a learned Bráhman made by Manu is not observed in British India.[4] The sovereign may also take by forfeiture the property of rebels, atrocious criminals and proclaimed offenders.[5]

The highest interest in land held by a subject at the present moment is what is known as lakhiraj tenure, or land exempt from the payment of rent or revenue. These tenures are the relics of a former dynasty, and cannot now be made without the permission of Government. Regulation XIX of 1793, s. 3 provides, "that all grants for holding land exempt from the payment of revenue which may have been made since the 12th August, 1765 by any other authority than that of Government, or by any other officer empowered to confirm them, are declared invalid." The date here given is the date fixed for the acquisition of Bengal, the dates are different in the other Provinces, varying according to the time when they were respectively acquired. Regulation XXXVII of 1793, s. 2 provides—"*altámgah, jaghire, ayama, muddadmash* or other *badshahie* royal grants created prior to 12th August, 1765 shall be deemed valid." These tenures were treated as life-grants. S. 15 provides—"altámgah, ayma and muddadmash are to be considered as hereditary tenures. These and other tenures which from the terms or nature of them may be hereditary are declared transferable by gift, sale or otherwise." Act XXIII of 1850, s. 6 provides: "lakhiraj tenures of land in Calcutta of which uninterrupted possession has been held exempt from assessment for 60 years shall be valid, no other lakhiraj tenure of land in Calcutta shall be valid."[6] This provision accords with the provision made in the mofussil by Regulation XIV of 1825, s. 3, cl. 2.

The question, how far a zemindar or a person who pays revenue to Government for his lands, is able to create lakhiraj tenures was discussed at length in the nomed Akil *v.* Assadunnissa,[7] and the following points were established, that after a Permanent Settlement, a grant by a zemindar to hold lands

[1] Manu, c. 8, vv. 38 and 39.

[2] 1 Stephen's Commentaries, 437, 5th Edition.

[3] Manu, c. 9, v. 189.

[4] Collector of Musulipatam, 8 Moore's, I. A. 500.

[5] The Penal Code, s. 62. The Criminal Procedure Code. See, Q. *v.* Totah, 12 W. R.,

[6] A holding in Calcutta can be redeemed on payment of thirty years' rent to the Collectorate under the orders of Government, No. 375—167, L. R., dated 19th February, 1881.

[7] B. L. R., Sup. Vol., F. B., 774.

"rent free" is not a grant to hold free from the payment of revenue, (*b*) that such a grant is void as against a purchaser at a sale for arrears of revenue; but that as long as the revenue is paid, it cannot be treated by Government as a nullity as affecting their interests injuriously, (*c*) a rent-free grant cannot be treated as a nullity by the grantor, or his heir, or by any persons claiming through him.

The word "estate," under the Acts, means any land or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the register known as the General Register of all revenue-paying estates, or in respect of which a separate account may, in pursuance of section 10, or section 11 of Act XI of 1859 have been opened. The word "tenure" includes all interests in land whether rent-paying or lakhiraj (other than estates as above defined) and all fisheries, which by the terms of the grant creating the same or by the custom of the country, are transferable, whether such tenures are resumable or not, and whether the right of selling or bringing them to sale for an arrear of rent [illegible] or may not have been specially reserved by stipulation in any instrument. Transferability, as will be observed, is the essence of what is regarded to constitute a tenure.

Under the provisions of the Road Cess, and Public W[illegible] Acts,[2] no land now exempt from the payment of such charges to Government as may be required necessary for those purposes.

It will be remembered that under Mussulman rule zemindars and landholders were within their possessions responsible for important police work. [illegible] such responsibility, the zemindars were for the most part gradually relieved by British Government; but every landholder is now, whether Native, or Europ[illegible] British subject, amenable to the same jurisdiction, and still bound to do cert[illegible] things in the nature of police duties, such as giving information of, or interf[illegible]ing to prevent, a riot or unlawful assembly.[3] The provisions of Act II of 18[illegible] are in the following terms: "No person whatever, being the owner or holder [illegible] farmer of any property in land, or in any emoluments issuing out of land [illegible] any part of the said territories, whether in perpetuity or for a term, or bei[illegible] local agent or manager of any such property is by reason of his place of bi[illegible] or by reason of his descent exempt from any public charge or assessmen[illegible] any duty connected with the police or of any duty whatsoever of a pu[illegible] nature, to which he would otherwise be subject, as owner or holder of such property or as a local agent or manager thereof. For the non-payment of any such public charge or assessment, or for the breach of any such duty as aforesaid, or for any neglect or misconduct in the discharge thereof, every person, what-

[1] Field's Introduction to the Regulations.

[2] Bengal Act X of 1871.

[3] The Penal Code, ss. 154, 155, 156.

ever may have been his place of birth or his descent, shall be subject to the same laws, regulation and procedure and to the same jurisdiction, as if he were a native of the said territories." It is the duty of a landholder to give information in respect of the permanent or temporary residence of any notorious receiver or vendor of stolen property in his village, the resort to any place within, or the passage through such village of any person whom he knows or reasonably suspects to be a thug, robber, escaped convict, or proclaimed offender; the commission of, or intention to, commit, any non-bailable offence in or near such village; the occurrence therein of any sudden or unnatural death, or of any death under suspicious circumstances.[1] Moreover, it is the duty of a landholder to execute within his land a warrant of a Magistrate for the arrest of any escaped convict, proclaimed offender, or person who has been accused of a non-bailable offence, and who has eluded pursuit.[2]

[1] The Criminal Procedure Code, s. 45.

[2] The Criminal Procedure Code, s. 78.

LECTURE III.

THE DETERMINATION OF PROPRIETORY RIGHT.

Topic of wealth or property—The Elements of Property—Individual Ownership—*Mancipium, Dominium* and *Proprietas*—Quirites, origin of—Property and family—Persons included in property in Ancient Law—Persons, how far the object of property in British India—*Abdul Kadir* v. *Salima*—In re *Cochrane*—Restitution of Conjugal rights—The Law of adultery—*Terry* v. *Hutchinson*—"Property" in English Law—*Res*—*Bona* and *dhanam*—Mál, or property in Mussulman Law—*Res communes*—William Aldred's Case—*Bagnall* v. *London* and *North-Western Railway Co.*—Right to flowing water—Fishery right—*Sic utere tuo ut alienum non lædas*—Cases illustrative of the maxim—*Jus utendi* and *Jus abutendi*—Application of the maxim distinguished from Easements—The Limitation Act—*Ann* v. *Dalton*.

Man must live and seek the necessaries or the luxuries of life from ex[illegible] nature. His ambition, though it received some check, as we have already [illegible] during the Household stage of his existence, has ever been to acquire, whe[illegible] it be a piece of venison or a parcel of territory. The first [illegible] care of [illegible] societies is the production of wealth, and the aim of all Governments has [illegible] cordingly been to secure and preserve the fruits of labour in the hands of [illegible] acquirer. Thus, the topic of wealth or property with its rights and remedies [illegible] come to occupy by far the largest space in the body of laws of every [illegible] In the conception of property, the two obvious elements are—a person ow[illegible] and a thing owned; but there is another most essential ingredient, the ele[illegible] exclusiveness. A person is said to have property in a thing; because, un[illegible] be with his consent or permission, no other person has the right or legal [illegible] to interfere with that thing or claim a share in it, and in case any one [illegible] exercise that illegal power, the state or political society will punish h[illegible] restore the owner to his right. In a state of nature, or under a rude [illegible] communism, physical force would more or less regulate the course of acqu[illegible] In a religious society, such as we are acquainted with in primitive Rome or ancient India, whatever is earned by one member of a family is regarded as the common acquisition of all the members, and passes under the *potestas* of the father, or the eldest agnate, who fills the position of a trustee or guardian. It is not until a spirit of commerce or adventure has disturbed the equilibrium of settled societies that a man becomes the supreme master of his own acquisitions, and a proprietor in the true sense of the term. In modern political societies, it is possible for a man, subject to the paramount right of the sovereign power in the state, to hold a thing which he has acquired entirely for his own

use, and dispose of it in any way and to whomsoever he likes. In the Digest preserved to us by Justinian, we meet with certain terms—*mancipium*, *dominium* and *proprietas*—which are used indifferently to denote property or ownership. These terms, if etymology is a guide to the origin of names, are eminently characteristic of the three stages of social development which we have described at some length in the Introduction. While *mancipium* points to physical force as the symbol of acquisition, *dominium* directs the mind to the family stage, and *proprietas* emphasizes the fact of individual ownership. The word "property" is associated with the name of Neratius[1]—*Dominium id est proprietas* is the language of the jurist. The term *mancipium* literally implies seizure, capture, or, more distinctly, grasping with the hand, in other words, the title of the robber or the warrior. The Romans were the Quirites or the men of the lance.[2] The lance with the old Roman was the symbol of property, and, like the sword in Cshatrya ceremonies, formed likewise a part of the formalities of marriage. By the lance the Romans acquired their territory, their property, their companions and even their wives. "*Leurs esclaves*," observes M. Ortolan,[3] *étaient* "*un butin, leurs femmes étaient un butin, les enfants qui en étaient issus étaient une provenance de leur chose.*" It is well known that among the old Romans the power of the father of a family was one of deep despotism. The Roman pater-familias had the same right over his wife and children[4] as over his cattle and slaves. In primitive society, a wife and a thing are synonymous terms, and are to be acquired and disposed of in the same way. We discern some shadowy traces of the Roman condition of affairs in ancient India. And although the position of women became one of the highest dignity in Bráhman India, a solitary passage in Manu,[5] and the serious discussions by which some Bráhman jurists endeavour to show that neither a wife nor a son or a daughter can be the object of property, lead to the conclusion that the ancient Aryan idea of property comprehended the whole family. There is an old passage which runs thus—"In a sacrifice known as *Viswajit* the whole property (सर्वस्वम्) should be given, yet the daughter, the son and the like should not be given."[6] Commentators rely upon this text to show that the persons referred to therein cannot be regarded as property; but it is obvious from the text that at one time such persons could be given away like any other property.

In the progress of society, the son, the wife, or the daughter was no more regarded as a thing or an object of property, but there still remained certain persons who were included in the category of things, these were known as slaves. In the system of jurisprudence recognized in British India, a human being is never treated as a subject of property in the ordinary acceptation of the term;

[1] D. 41, 1, 13, De acquirendo rerum Dominio.

[2] Ovid, Fasti L. 2, 477.

[3] La Législation Romaine, Tom. I, 42.

[4] *Jus vitæ et necis.*

[5] Manu, C. VIII, 416.

[6] Mandlik's Vyavahára Mayúkha, 35.

there are, however, a few instances in which a person is deemed to be *quasi*-property or bearing some of the incidents of property. In *Abdul* v. *Salima*[1] the dower or *mehr* under the Mussulman law is said to represent the price in an ordinary contract of sale, and the wife's right to resist her husband so long as the dower remains unpaid to be analogous to the lien of a vendor upon the sold goods while they remain in his possession. There is no doubt that one of the sources, and, indeed, the main source of law in this country, is the English law, and that law lays down that the husband has in consequence of his marriage a right to the custody of his wife, and whoever detains her violates that right, and he has a right to seize her wherever he finds her.[2] *In re* Cochrane,[3] the Court observed: "The law has respected the terms of the marriage contract and the inferiority of the sex. There can be no doubt of the general dominion which the law of England gives to the husband over the wife. The husband has by law power and dominion over his wife, and may keep her by force within the bounds of duty and may beat her, but not in a violent and cruel manner." We may observe that the law relating to the restitution of conjugal rights[4] is founded upon these principles, but under that law, it would appear, it is left open to the wife to pursue her remedy against her husband, and in case of his refusal to cohabit with her, to cast him in prison. The law of adultery[5] and the action for damages which the law provides against the adulterer, it should be noted, absolutely bring the wife down to the position of a thing. So, English law, and the principle must be understood to prevail in this country, an action for damages in a case of seduction seems to be based on the proprietary right of the father and mother over a daughter who happens to be under age. In *Terry* v. *Hutchinson*,[6] although a daughter was in the service of a draper at the time of her seduction, in consequence of which she was afterwards dismissed by her master, the court (Cockburn, C. J. and Blackburn, J.) held, on an action by the father, that "the daughter was a part of the family at the seduction and liable to his control and command, and that the action, whether creditable to the law or not, was fixed on the special ground of loss of service." One cannot help expressing one's surprise that in this case a more liberal view of the law was not adopted, such as was conceived by Lord Eldon in a similar case[7] half a century before. "The defendant's counsel," observed that great judge, "object that all evidence except that which applies to loss of service is inadmissible. In point of form, the action only purports to give a recompence for loss of service; but we cannot shut our eyes to the fact, that this is an action brought by a parent for an injury to her child; in such case I am

[1] I. L R., 8 All., 149.

[2] Per Mansfield, C. J., 1 Higgs. Cons. Rep. 35, 36, 1 Burr. 542.

[3] 4 Jurist 1840, 536.

[4] The Civil Procedure Code, s. 260.

[5] The Indian Penal Code, 498.

[6] L. R. 3 Q. B. 599.

[7] Bedford *v.* McKowl, 3 Espinassi, 119.

of opinion that the jury may take into their consideration all that she can feel from the nature of her loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and, as the parent of other children, whose morals may be corrupted by her example." Breach of contract of service under the Penal Code may also be cited as an instance where a person is regarded as a sort of property.

Dominium or *proprietas* in Roman jurisprudence expresses the aggregate of rights which constitute ownership (स्वत्वम् in Brahmanic law). "Property" in English law is justly said to be an abused term.[1] It means either the aggregate of rights of an owner, or the thing itself which is the object of those rights. The Roman "*res*" signified indifferently a thing or object of property, and rights and obligations[2]; but the word *bona*, goods or wealth, may be taken as the exact equivalent of a thing corresponding to the Sanskrit *dhanam* (धनं).[3] In the language of the Arabian jurists, *mál* stands for property and means anything that has a value in law (*bashariyat*), and can be in the power of anybody.[4] Air is not the subject of property, because it is not in the power of anybody; but water is, and that for obvious reasons. In the arid desert of Arabia the water-bearer is described as a man of Paradise.[5] Wine and pork are not property according to that law; nor carrion nor blood.[6] The word *milk* signifies ownership, and is defined to be a right or power (قدرت) which one has over a thing in his possession and may use it (*tassarufat*)[7] in any way he pleases in accordance with the Shara. In the Bill to amend the law relating to the Transfer of Property as revised by the Indian Law Commission, the words "ownership" and "property" are thus defined in accordance with the definition found in The New York Code, para. 159:—"The *ownership* of a thing is the right of one or more persons to possess and use it to the *exclusion* of others; the thing of which there may be ownership is called *property*." Here the term "property" is used in the sense of a thing. It is doubtful whether the definition is not somewhat misleading, for although a royal tiger in the dense jungles of the Sunderbans may be an object of ownership, it cannot be strictly called property until it has been captured and is in the possession of somebody, who can then alone be said to hold it in exclusion of others. The Transfer of Property Act[8] leaves the terms "ownership" and "property" wholly undefined, and one must endeavour to find out the exact meanings of these important terms from outside the limits of that code.

[1] Amos. Jurisprudence.

[2] D. 50. 16. 23.

[3] Hunter's Roman Law, 203. Manu's Code.

[4] The well-known saying of the Mussulman Doctors—

چیزي که بشریعت قیمت داشته باشد

[5] بهشتي (bihishtee, *corr.* bhishti) = water-carrier.

[6] Hamilton's Hedaya by Grady, 266.

[7] *Ibid.*, 359.

[8] Act IV of 1882.

All things that we see around us in the external world are not necessarily objects of "property," that is, of which it can be asserted that one man or a number of men may hold them as owners in exclusion of others. There are things which are by their nature incapable of exclusive ownership, and one cannot use them to the disparagement of another. These are said to be wandering and undemarcatable things. Air, light, the sea and its shore, tidal and navigable rivers, and flowing streams may be cited as instances. By the law of nature, in the language of Roman law, the following things are common to all:—the air (*aer*), running water, (*aqua profluens*) the sea (*mare*), and the shores of the sea (*litora maris*) all rivers (*flumina*) and ports are public, and the right of fishing in ports and rivers are common to all. A man, for instance, must not use the air as against an adjacent owner; in other words, no one has the right to use the waves of air which passes through his land in such a way as to interfere with the enjoyment of the owners of adjacent lands.[1] One of the earliest reported English cases on the use of air and light so far as I have been able to discover is William Aldred's case.[2] There, the owner of a house brought an action against his neighbour for converting his premises into a dwelling-place for hogs. The defence raised was that the building of the house for hogs was necessary for the sustenance of men, and one ought not to have "so delicate a nose that he cannot bear the smell of hogs; for *lex non favet delicatorum votis.*" It was observed in the course of the decision that in a house four things were desired, *habitatio hominis, necessitas luminis, salubritas æris, et delectatio inhabitantis*, and that for nuisance done to the first three an action lay. And that if the stopping of the wholesome air gave a cause of action, *a fortiori* an action lay in the case at the bar for infecting and corrupting the air. It was held that for stopping as well of the wholesome air as of light action lay; but for prospect which was a matter only of delight no action lay for the stopping thereof. In *Bagnall* v. *London and North Western Railway Co.*,[3] it was said that "the common law allows any person to build on his own land, but it does not allow him to build so as to obstruct his neighbour's light." In *Bagram* v. *Karforma*,[4] Peacock, C. J., laid down a distinction between the use of light and air, and that of streams of water, and it is clear from that decision that a right to the use of flowing water is a natural right; whereas the right to the use of light and air as between neighbouring proprietors of land and premises is one that is acquired by prescription. "The principle applicable to streams of water," observes the Chief Justice, "has not been extended to rays of light; for it would be contrary to general convenience, and no man could create a work or any other building upon his land without the consent of his neighbour, for

[1] Quid prohibetis aquis? Usus communis aquarum est,
Nec solem proprium natura, nec aëra fecit,
Nec tenues undas. Ovid. Met. 6.

[2] 9 Co. 57.

[3] 7 Hurlston and Norman, 441.

[4] 3 B. L. R., 54.

he would thereby obstruct some of the rays which pass over his land to his neighbour's. But when a man erects a house at the extremity of his own boundary, and uses the light which passes over his neighbour's land, and through the windows of his house, he is in fact as much in possession of that point of every ray of light which enters his house, as he is of a way over his neighbour's land, and after twenty years' uninterrupted enjoyment, he may be presumed to have acquired as great a right to prevent the obstruction of the light necessary for the habitation of his house as he has to prevent the obstruction of a stream of water on his neighbour's land above his own. He appropriates to his own use for the purpose of habitation and use for that purpose as of right, every ray of light which passes over his neighbour's land, and after 20 years' enjoyment with the acquiescence of his neighbour, he has as great a right to have light pass in its natural and accustomed course, so far as is necessary for the reasonable and comfortable use of his house, as he would to have a stream of water pass over his neighbour's land without obstruction. But he cannot appropriate more of the light than is necessary. If he requires more, either for luxury or for delight, or to increase the value of his property, he must obtain an express grant. The law of presumption will not assist him.

Every proprietor of land on the banks of a river has naturally (*ex jure naturæ*) an equal right to the use of the water. He has no property in the water itself; but a simple usufruct as it passes along. *Aqua currit et debet currere*, is the language of the law.[1] Bracton considers the obligation to respect the natural course of a flowing stream as a duty imposed by law, and that the owner of land over which water flows has no more right to divert the course of a stream than he has to pen back the water, or to divert it into his neighbour's land.[2] Mr. Justice Story lays it down that the right to have a stream flow in its accustomed course, is a right universally incident to the property in the adjoining land. He says, "Every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank to the middle thread of the stream, or as it is commonly expressed '*ad medium filum aquæ*.' In virtue of his ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, *strictly speaking he has no property in the water itself, but a simple use of it as it passes along*." The consequence of this principle is, that no riparian proprietor has a right to use the water of a stream to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors in the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or throw it back upon a proprietor above. The principle has also been well explained by Mr.

[1] 3 Kent. Com., 439.

[2] Bract, Lib., 4.

Addison;—All lands are of necessity burdened with the servitude of receiving and discharging all waters which naturally flow down to them from lands on a higher level; and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher roads to be flooded, he is responsible in damages for infringing the *natural right of the possessor* of such higher lands to the natural outfall or drainage of the soil. So if the proprietor of the higher lands alters the natural condition of the property, and collects the surface and rain-water together at the boundary of his estate, and pours it in a concentrated form and in unnatural quantity upon the land below, he will be responsible for all damages thereby caused to the possessor of the lower lands.[1] It was said, in *Mothoora Mohun Mytee* v. *Mohendranath Pal*,[2] that there could be no doubt that after water had reached a definite channel each party through whose land it flowed would have a natural right to the advantage of the stream, be it river or mere watercourse flowing in its natural course through his lands, and to a reasonable use of the water flowing through them, and consequently could maintain an action against any party who obstructed the stream, or in any way altered the natural course of the stream as to flow, quantity and quality. In an agricultural country like India, such rights are of the greater importance, and have accordingly been held to partake of the character of natural and necessary servitude.

In *Wood* v. *Wand*[3] it was found that the defendants had fouled the water of the natural stream, by pouring in soap-suds, woolcombers' seeds &c., but that pollution of the natural stream had done no actual damage to the plaintiff, because it had been already so polluted by similar acts of mill-owners above the defendants' mills, and by dyers still further up the stream, and some sewers of the town of Bradford, that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water had been before. Notwithstanding this finding, Pollock, C. B. was of opinion that the plaintiffs had received damage in law. They as riparian proprietors had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed. Similarly, in *Rameshwar Pershad Narain Singh* v. *Koonj Behari Pattuk*,[4] the observation of Sir Montague Smith is to the following effect: "There is no doubt that in respect of the right to the water of a river flowing in a natural channel through a man's land, each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural right incident to the ownership of it.

On the subject of property in tidal and navigable rivers and in the sea, so

[1] Addison on Torts, 59, 4th Edition.

[2] S. D. D. 1859, Par. ii, 302.

[3] 3 Exch., 772.

[4] L. R. 6 I. Ap., 38.

far as it is within the territory of a particular state, one of the oldest English cases appears to be *Warren* v. *Mathews*.[1] Every subject, it was there said by Holt, C. J., of common right may fish with lawful nets in a navigable river, as well as in the sea, and the King's grant cannot bar them thereof." The question was more fully discussed in *William Ward* v. *William Cresswell*[2] and the substance of the judgment of Willes, C. J. was as follows: "In *Pell* v. *Towers* it was agreed that a man shall not prescribe in that which the law of common right gives. In *Warren* v. *Mathews* it was holden that "every subject of common right may fish with lawful nets in a navigable river as well as in the sea. And this is not merely the law of this country, but is also the law of nations; and Bracton says, *Publicæ vero sunt omnia flumina et portus, ideoque jus piscandi omnibus comune est in portu et in fluminibus.* This prescription therefore for a right common to all the subjects of the realm cannot be supported. A man might as well prescribe that he, and all those whose estate he has, have a right to travel in the king's highway as appurtenant to his estate. The right of fishing in the sea is a right common to all the king's subjects and therefore a prescription for such a right as annexed to certain tenements is bad."

It would appear that prior to 1868 the Government of this country had for a long series of years constantly been in the habit of making settlements for the right of fishing in tidal navigable rivers with private individuals; but since then the practice has, in conformity with the principles embodied in the aforesaid cases, been abandoned. Upon a Full Bench Reference in *Horidas Mal* v. *Mahomed Jaki*,[3] it was no doubt held that the exclusive right of fishing in tidal navigable rivers may be granted by the Crown to private individuals; but the observation of Garth, C. J. is worthy of attention:—"I have no doubt but that the policy which seems to have been pursued by the Government of Bengal since the year 1868 of making no further settlements of julkur with private persons is a wise and beneficent policy. But, on the other hand, it would seem very unjust to deprive zemindars of any rights which they may have previously acquired under such settlements." In *Prosunno Coomar Sircar* v. *Ram Coomar Parody*, Markby, J. has observed that the Government is a mere trustee on behalf of the public in respect of tidal rivers, and the exclusive right of fishing in tidal rivers cannot be granted to private individuals or to certain classes of persons to the exclusion of the public.[4] So also with regard to the sea, the right of fishing in it is common to all the subjects of the adjoining territory. In *Reg* v. *Kastya Rama*,[5] West, J. was not aware that in any case a subject in the Bombay Presi-

[1] Q B. 6. Mod, 73, 1794 Note the remark of Hale, C. J, in Warren *v* Prideaux, 1 Mad., 105 —"By Magna Charta and other statutes every one has a liberty to go and come upon the sea without impediment."

[2] Wills Rep, 268

[3] I L R. 11 Cal, 434

[4] I L. R 4 Cal, 53.

[5] 8 Bom H. C. R.

dency had been excluded from fishing in any part of the sea. In *Bábán Mayáchá* v. *Nágú Shravucha*,[1] Westropp, C. J. was of opinion that it was settled law that the sea and its subjacent soil within the ordinary territorial limits at least around British India was vested in the sovereign, but that the use of it for the purposes of navigation and fishing belonged *communis juris* to the subject *at least so far as it had not otherwise been appropriated by the sovereign.*

The sea-shore, according to Lord Hale's definition, is the ground between the ordinary high and low water-marks.[2] It will be easily seen that the public right to the use of navigable rivers, and the part of the sea within the ordinary territorial limits of a country, is analogous to the right to the use of public highways, gardens, tanks &c. These are artificial things of which the dominion is in the state or a municipal corporation, and the reasonable use in every member of the community. In the language of the Roman Law, highways, pleasure-grounds, squares, race-courses &c. are things public, or publici Juris.[3] And article 528 of the French Code speaks of highways, roads, and streets as being at the national charge.

The cases dealing with things which are the subjects of common right are really illustrative, and form part, of the large doctrine of *sic utere tuo ut alienum non lædas*, which assigns a limit to the proposition that a man may do whatever he likes with his own property. Note the observations of Lord Chancellor Westbury in the *Directors of the St. Helen's Smelting Company* and *William Tipping*.[4] There was an action brought by the plaintiff to recover from the defendants damages for injuries done to his trees and crops by their works. The defendants were the Directors and Shareholders of the St. Helen's Copper Smelting Company Limited. The plaintiff in 1860 purchased a large portion of the Bold Hall estate, consisting of the Manor House and about 1300 acres of land, within a short distance of which stood the works of the defendants. The declaration alleged that "the defendants erected, used and continued to use certain smelting works upon land near to the said dwelling-house and lands of the plaintiff, and caused large quantities of noxious gases, vapours and other noxious matter to issue from the said works, and diffuse them over the land and premises of the plaintiff, whereby the hedges, trees, shrubs, fruit and herbage were greatly injured, the cattle were rendered unhealthy and the plaintiff was prevented from having so beneficial a use of the said land and premises as he would otherwise have enjoyed. The defendants' counsel submitted that the three questions which ought to be left to the Jury upon the whole case were, "Whether it was a necessary trade, whether the place was a suitable place for such a trade, and whether it was carried on in a reasonable manner." On appeal, His Lordship went on to observe "It appears to me that it is a very

[1] I. L. R., 2 Bom., 30.

[2] 3 Kent's Commentaries, 546.

[3] D. 43, 8, 2, 22. D. 43, 10, 1, 1.

[4] 11 House of Lords, 642.

desirable thing in matters of this description to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But, when an occupation is carried on by one person in the neighbourhood of another, and the result of the trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required for persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to the circumstances *the immediate result of which* is sensible injury to the value of the property. Now, in the present case it appears that the plaintiff purchased a very valuable estate, which lies within a mile and a half from certain large smelting works. What the occupation of these copper smelting premises was anterior to the year 1860 does not clearly appear. The plaintiff became the proprietor of an estate of great value in the month of June 1860. In the month of September 1860 very extensive smelting operations began on the property of the present appellants in their works at St. Helen's. Of the effect of the vapours exhaling from these works upon the plaintiff's property and the injury done to his trees and shrubs, there is abundance of evidence in the case. The action has been brought upon that, and the jurors have found the existence of the injury, and the only ground upon which it has been asked to set aside the verdict, and direct a new trial is this, that the whole neighbourhood where these copper smelting works were carried on, is a neighbourhood more or less devoted to manufactory purposes of a similar kind, and therefore it is said that inasmuch as this copper-smelting is carried, on in what the appellant contends is a fit place, it may be carried on with impunity. I apprehend that that is not the meaning of the word *suitable*, or

the meaning of the word *convenient* which has been used as applicable to the subject. The word *suitable* cannot unquestionably carry with it the consequence that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property. Of course, I except cases where any prescription has been acquired by a lengthened use of the place."

The dominion over things, which, unlike air and water, are by their nature capable of exclusive ownership, is thus subject to the general limitation, that men may not use a thing which is entirely their own so as to injure the property of others.

In Alston *against* Grant,[1] the defendants were owners of two houses occupied by the plaintiff as their tenant; he having taken from them one house in 1845 and the other in the summer of 1851. About twenty years ago, the defendants for their own accommodation and convenience, constructed a sewer, which carried off the water from a reservoir belonging to them: and they had since then kept and continued it for their own accommodation and convenience down to the February of 1852. In July 1852, water from this sewer flowed into the cellar of both the houses occupied by him. On each occasion much damage was done. Upon this state of facts the learned Judge observed:—"the plaintiff though tenant to defendants had as against them the rights of an ordinary neighbour. It seems to me that a right is cast on one's neighbour not to injure another in his ordinary enjoyment. The plaintiff had a cellar filled with goods; his ordinary enjoyment of that included its not being filled with water. The defendants bring water down a sewer; that they might do; but if ordinary care is not taken, and by reason of such want of care the water gets into the plaintiff's cellar, and does damage, it seems no answer to say that the plaintiff came into the house with the knowledge that the nuisance was going on."

In *Bagnall* v. *London and North-Western Railway Co.*,[2] the plaintiffs were owners and occupiers of a coal-mine which, as well as the surface land, formerly belonged to the same owner. A railway-company, to whose rights and obligations the defendants succeeded, purchased under the powers of their Act of Parliament, the surface land for the purpose of their railway, and constructed it thereon. The Company cut and removed upwards of twenty feet in thickness of the surface soil over the plaintiffs' mine to get the level at which they laid their rails. This soil was impervious to water; by removing it a porous rock was reached. The soil was in like manner cut away by the Company along the length of their line to a lower district of country, through which a brook flowed. The railway was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine.

[1] 3 Q. B., 129.

[2] 7 H. and N., 423.

The bridge was sufficient to let the ordinary water of the brook pass, but was an impediment to the passage of water in large floods. The Company were required by their Act of Parliament to make and maintain sufficient drains. At the time the railway was made, the plaintiffs' mine was not worked within forty yards of it; and drains were made at the side of the railway sufficient to carry off the water. Subsequently, the plaintiffs gave the defendants notice of their intention to work the mine under the railway. The defendants having declined to purchase the mine, the plaintiffs worked under it, when from no fault or negligence of theirs, but as the natural consequence of fair and lawful working, the railway sank and continued to do so from time to time. The defendants threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. Afterwards a flood happened, and the water, part of which would have escaped but for the bridge, flowed down the railway, and in consequence of the high ground between the brook and the surface over the mine being removed, it reached that spot, and together with the water falling there and the springs arising in the cutting, penetrated into the mine for want of efficient drains. The defendants were held liable in an action for the damage sustained by the plaintiffs. Pollock, C. B. thus laid down the principle, "it is no answer for the Company to say: *what we have done, we have done under an Act of Parliament which gave us certain powers.* Those powers are subject to the maxim, *sic utere tuo alienum non lædas*, the power to make a railway can only be used to this extent, that it cannot be said that the act *per se* is a nuisance. The common law allows any person to build on his own land, but it does not allow him to build so as to obstruct his neighbour's light."

In *Humphries* v. *Brogden*,[1] it was proved that the plaintiff was in occupation of the surface and the defendant of the subjacent minerals; but there was no evidence how the occupation of the superior and inferior strata came into different hands. The surface was not built upon. The jury found that the defendants had worked the mines carefully and according to custom, but without leaving sufficient support for the surface. It was there held, that the plaintiff was, on the finding, entitled to have the verdict entered for him for damages; for that of common right, the owner of the surface is entitled to support from the subjacent strata; and if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state. Per Lord Campbell, C. J., "in 2 Rolle's Abridgement, 564, tit. *Trespass* (1), pt. 1., it is said: If A seized in fee of land next adjoining the land of B, erect a new house on his land, and part of the house is erected on the surface of his land next adjoining the land of B, if B afterwards digs his land near to the foundation of the house of A, but not touching the land of A, whereby the foundation of the house and the house

[1] 12 Q. B., 739.

itself fall into the pit, still no action lies at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B, for he could not by his act hinder B from making the most profitable use of B's own land;[1] but, *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." This doctrine is recognized by Lord C. B. Comyns, *Com. Dig*, *action upon the case for a nuisance* (A); by Lord Tenterden in *Wyatt* v. *Harrison*;[2] and by other eminent judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do on his own property, it is in accordance with the precept, *sic utere tuo ut alienum non lædas*. As is well observed by a modern writer: "if the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone."[3] This case, as was observed by Lord Campbell, was entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements were affected by the erection of *buildings*, for the plaintiff claimed no greater degree of support for his lands than they must have required and enjoyed "since the globe subsisted in its present form."[4]

In *Sutton* v. *Clarke*[5] it was held that "where an individual for his own benefit makes an improvement on his own land according to his best skill and diligence, and not foreseeing that it would produce any injury to his neighbour if he thereby unwittingly injures his neighbour he will be responsible." In *Wyatt* v. *Harrison*[6] Tenterden, C. J. observes: "whether if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there, so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? It may be true that if any land adjoin that of another, and I have not by building increased the weight upon may soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action. But if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." In *Hunt* v. *Peake*,[7] a bill was filed praying, among other things, for an injunction to restrain the defendant from his working in his own land so far as they might deprive the plaintiff of lateral support for the foundation of his houses: Vice-Chancellor Sir W. Page-Wood there observes: "what I conceive to be settled is this, that

[1] *Wilde* v. *Minsterly*.
[2] 3 B and Ad., 871, 876.
[3] Gale on Easements, 216.
[4] See also *Jeffries* v. *Williams*, 5 Ex., 792.
[5] 6 Taunton's Rep., 44.
[6] 3 B and Ad., 876.
[7] Johnson's Rep., 706.

every person in working the earth in his own land, whether by surface excavations or underground pits, is bound so to work as not to cause any subsidence of the original soil of his neighbour. In other words, every man is entitled to have his land in its natural state supported by the adjoining land of his neighbour, and this is an original right incident to his property of which he cannot be deprived by any operation which his neighbour may carry on in his adjoining property. This was decided in *Humphreys* v. *Brogden*, and had indeed been held long before in *Wilde* v. *Ministerly*.[1] There is no question, therefore, whether the workings are skilfully or unskilfully conducted. The right to support for soil itself is an absolute right which the adjoining owner is not entitled to infringe, whether by skilful workings or otherwise."

The maxim, *cujus est solum ejus est usque ud cœlum*, is generally found in connexion with the maxim *sic utere tuo ut alienum non lædas;* but the principle which the one affects is obviously distinct from the other. An action on the basis of the former rule is clearly founded on trespass or actual encroachment upon that which belongs to another. As in Penruddock's case.[2] There, in the mixed phraseology of those days: "A built on his own freehold an house so near the curtilage of the house of B that *domus illa superpendet* doth hang on *magnam partem, videlicet 3 pedes curtilagii*," in other words, A built so that the structure overhung the courtyard of B, and the Court held that an action would lie at the instance of B upon the principle, "*cujus est solum ejus est usque ad cœlum.*"

Subject to the limitation I have endeavoured to illustrate, an owner's right of *using* his property is in its nature absolute. Such right being in the expressive language of the Roman jurists[3] a right to draw from the thing owned not only all the use and service which it can render; but even to destroy it if he is so minded; or in the forcible words of M. Ortolan: "*Meme en la detruisant.*" The law of punishments gives no immunity to a person who, at the request, and with the consent of another, commits grievous hurt on the body of the latter; but a person is held to be guiltless who, under the direction of the owner, burns his valuable furniture, or cuts his picture to rags, or pulls down his fine house, shoots to death the best horses in his stables, or casts into the sea his best plates, however capricious these orders may be.[4]

The use and application of the maxim, *sic utere tuo ut alienum non lædas*, must not, however, be confounded with, though in some respects it is similar to, the rights which are known as easements. The rights under the one are always, as

[1] 2 Rolle's Abridgement, 564.

[2] Coke's Report, Part VI, 101. See, also, Baten's Case, Coke's Rep. Part IX, 53.

[3] Ortolan's Institutes of Justinian ii, 256. Note the words of the Roman Law, *jus abutendi.*

[4] Report of the Indian Law Commission, 14th October, 1837, p 130.

the rights under the other are frequently, regarded to be independent of contract; but the one set of rights bears the character of natural rights, while the other set of rights is acquired, when independent of contract, by lapse of time, long user or length of possession. For instance, the right that a man should not build his wall so high as to obstruct my light or block up my window, the right to fish in the bheel in a village, the right to walk over my neighbour's ground; such rights are understood to be acquired by length of user, or as it is sometimes said, after 20 years of undisputed possession.[1]

In *Angus* v. *Dalton*,[2] for more than 20 years before 1849, two dwelling-houses of considerable age had stood side by side; in that year one of them was converted into a factory, the internal walls being removed, and the girders, which supported the upper floors of the factory, being let into a large churning-stack, the foundations of which being in contact with the soil under the adjoining house, the lateral pressure on that soil was materially increased. The plaintiff eventually became possessed of the factory, and after it had stood for 27 years, the defendant C contracted with the defendant D to pull down the adjoining house and to excavate the soil forming its site. D employed N to do the excavations; in consequence of the excavations, which, however, were not done negligently, the foundations of the churning-stack of the plaintiff's factory, being deprived of the support of the adjacent soil, gave way. It was there decided that the right to the support of a building by the adjacent soil of an adjacent owner is not a natural right of property; it is an easement which may be acquired by prescription, but it is not an easement within the Prescription Act.[3] It may also be acquired by the circumstance that the building has stood for 20 years, if during that period the owner of the adjoining soil knew or might have known that the building was thereby supported.

The special importance of this case consists in the distinction that is drawn in the course of the judgment between a natural right of property and the right in the nature of an easement. The right which a man has to restrain the owner of an adjoining soil from so exercising his right of user as not to leave any lateral support for the soil of the former is a natural right. Such a right is distinguished from the right, which a man might acquire by long possession of restraining his neighbour from so using his soil as not to leave any lateral support for the building which the former may have constructed on his own land. In the language of one of the judgments in the case, "the term *easement* is applicable to the right claimed in the action, because it is clear that the support of a building cannot be claimed as a natural right of property. Natural rights of property must be rights which attach to property in its

[1] The Limitation Act, s. 26.

[2] L. R., 4 Q. B. D., 163.

[3] 2 and 3 Will. IV, c. 71.

primitive state, and cannot, without a contradiction in terms be applied to an artificial subject matter like a house." This natural right was described in *Jeffries* v. *Williams*[1] as a right coeval with the right of property itself. In *Pannuswami Tevar* v. *The Collector of Madura*,[2] where the question arose as to the use of a stream of water, it was said "if this were a natural stream, the right to which the plaintiff lays claim to receive a flow of water unobstructed would be a natural right and not an easement. No such right can be claimed in an artificial stream, and the plaintiff, therefore, to succeed must show that he possesses an easement."

It should be observed that the natural right which forms the subject of discussion in the foregoing cases is strictly not so much a right existing in any person as that it is a limitation on the right of use or *jus utendi* which is an inherent element of proprietary right. In every case of proprietary right, no matter how full and absolute the right may be, the *jus utendi* must be considered as subject to the maxim *sic utere tuo ut alienum non lædas;* whereas a right of easement is a right which is actually acquired on the property of another, the consequence of which is a subtraction from the natural proprietary right of the latter.[3]

[1] 5 Exch., 794.

[2] 5 Mad, H R, 27.

[3] See also *Stokoe* v. *Singers*, 8 E. and B. 31, *Partridge* v *Scott*, 2 M. and W., 220.

LECTURE IV.

THE VARIOUS KINDS OF PROPERTY OR THINGS.

Ahrens, Definition of Property—Kinds of Property, how they vary—*Res mancipi, Res nec mancipi—Mancipatio—Traditio*—The importance of a division of things—M. Ortolan's observations—*Res mobilas* and *Res immobiles*—Bracton's classification—Chattels—Real Property and Personal Property—Corporeal and incorporeal—Justinian's definition, its incongruity—Servitudes of the Roman Law—Certain things of an amphibious nature—Fixtures, Emblements, Trees, Away going crop—Quidquid plantatur solo, solo cedit—*Lowton* v. *Lowton—Naylor* v. *Collinge*—The Brahminic notion of fixtures: receptacle more important than the soil—French Law, moveables and immoveables—The Common law of Germany—Law of Greece, Holland and Louisiana—Classification of things in British India—Brahmanic Law, *Paitrica* and *Swarjita*—Mussulman Law, *Manqula* and *Gaer Manqula*—The classification into moveables and immoveables connected with rights—The distinction of Immovable and Moveable in, Transfer, Succession, Jurisdiction, Limitation, and Execution of decrees—The various definitions of immoveable property in the Acts—Easements in British India—Fixtures in British India, how described—*Nathu Miah* v. *Nanda Rani—Miller* v. *Brindabun—Kalipershad Singh* v. *Hoolas Chand*—Tiled Huts—Presidency S. C. C. Act, s. 28—Copyright, Patent Right, Goodwill of a trade.

It has already been sufficiently ascertained that all physical objects do not form the subjects of property, or things which in the estimation of law are capable of appropriation by one or several persons in exclusion of others. Property has been defined by Ahrens to be a material thing subject to the immediate power of a person.[1] We have found that there are certain things which in their nature are incapable of appropriation. Air, for instance, and, in certain cases, water are for the free use of all mankind. We will now turn our consideration to the principle or mode in which things which can form the subject of property have been classified by jurists. The principle of division is not uniform in all ages and all countries. Things or objects which are capable of exclusive appropriation are variously described according to the various conditions of society. A fatted pig which is of considerable value in a certain kind of society is not even considered as mál or property in a Moslem community. Land, cattle, and slaves which are held in great estimation among a primitive or agricultural people may be disposed of without much scruple or ceremony in a highly commercial country. "Though immoveables and bipeds (slaves)," in the language of Brahmanic law, "have been acquired by the man himself there is no

[1] *Un bien matériel sujet au pouvoir immédiat d' une personne*, Ahrens, Cours ii, 117. Holland, 152.

giving away or selling them without convening all the sons."[1] Again, "land passes by these formalities, by consent of townsmen, of kinsmen, of neighbours, of heirs, and by gift of gold and water."[2] "In regard to the immoveable estate," observes the same author, "sale is not allowed, it may be mortgaged by consent of parties interested; if a sale must be made, it should be conducted *for the transfer of immoveable property* in the form of a gift, delivering with it gold and water."

In early Roman law, as recorded by Ulpian,[3] lands in Italy, and such cattle as oxen, horses, mules and asses carried a kind of dignity with them under the denomination of *res mancipi*. On the other hand, the costliest jewels and such beasts of burden as elephants and camels as well as land in the Provinces were relegated to the class of *res nec mancipi*. For the reason of this division, which on the face of it appears to be so arbitrary, one has to look to custom. The reason has an historical origin. The forms of conveyance among a primitive people have been known to assume a somewhat dramatic character.[4] Religion in early times lends its influence and prescribes many burdensome ceremonies for the transactions of life. The things which were placed in the rank of *res mancipi* were already known to the Romans, and, indeed, known from the earliest time. On the other hand, the things which were classed together as *res nec mancipi* were not of a domestic nature. They were foreign in their nature, or brought from foreign countries. The division of things into *res mancipi* and *res nec mancipi* is based upon the mode in which proprietary right could be acquired or conveyed in the one kind of things or the other. The mode of transfer in the case of *res mancipi* was called "*mancipatio*," or the conveyance *per æs et libram*, and is thus described by Gaius: "there were summoned as witnesses not less than five Roman citizens above the age of puberty, and another besides of the same condition to hold a balance of bronze (*æs*) who was called the libripens. He who received the object *in mancipio* holding a piece of bronze, spoke thus, 'I say this man (the object of transfer being a slave) is mine *ex jure quiritium*, and he has been bought by me with this piece of bronze and balance of bronze,' then with the piece of bronze he struck the balance and gave the piece of bronze, as if the price to be paid, to him from whom he received the object *in mancipio*." Bronze, it should be observed, was the metal used for vessels employed in sacred rites,[5] and corresponded probably with the gold in a Brahminic sale. The transfer of things *res nec mancipi* took a very simple form. Mere traditio or delivery was deemed sufficient for their conveyance. The transfer of *res mancipi* was prescribed by the *Jus civile*, whereas that of *res nec mancipi*

[1] Mitakshara, C. II, 1, 47.
[2] Ibid, C. I, 31, 32.
[3] 2 Ortolan's Institutes of Justinian, 235.
[4] Maine's Ancient Law, 276.
[5] Hunter's Roman Law, 813.

was the product of the *Jus gentium*.[1] What constitutes delivery is a question of some nicety, and which we shall have to dwell upon at some length hereafter. It is sufficient now to understand by the term not merely actual transfer of possession, but also such fact or event which in the eye of the law may amount to a transfer of possession.[2] Transfer of title deeds coupled with a written instrument of alienation, for instance, may, according to modern notions, be reckoned as a mode of transfer of possession of a thing of which the title deeds have been transferred, and conveyance executed. In Roman law, the obvious element of delivery of possession or *traditio* was, however, generally regarded to be the actual transfer of physical possession.[3]

The real importance of a division of the objects of property consists principally in the mode of their devolution after death, and transfer during life, of the owner according to the rules observed in a community. "The lawyer," observes M. Ortolan, "does not care to regard things in relation to their physical properties; his business is to determine the rights which men can have over them. Sometimes, however, the first of these considerations exercises a direct influence over the second." The most practical division of things, and that which is found almost without exception is modern societies, is that into moveable and immoveable. The division of property into moveable and immoveable occurs in the Digest.[4] *Res mobiles* or *res se moventes* signify moveable things whether they are animate or inanimate objects. *Res quæ soli sunt* or *res soli* signify immoveable things, or, as Ulpian has it in several places, *res immobiles*.[5] Bracton, after the manner of the Civil Law, comprehended all possessions within the term *bona*, which he distinguished into *mobilia* and *immobilia*. In the time of Edward III, chattels, in French the same, came to denote not only cattle (low Latin, catalla)[6] but all goods, moveable and immoveable, except such as were of the nature of freehold. Chattels were distinguished into chattels real, such as a lease of land for a term of years; and chattels personal, such as a bow or a horse. A freehold, it should be observed, could be transferred only by a peculiar mode of conveyance, such as livery of seisin or feoffment, whereas a chattel could be transferred by mere delivery, or sufficient intimation of delivery without any symbolism. In English law, all immoveable property does not possess the same legal incidents, whether in their mode of succession, or other kind of transfer. A leasehold interest, for instance, no matter how long its duration, does not descend

[1] Gaius, 1, 119.

[2] It is stated in a Constitution of *Severus* and *Antoninus* that delivery of title deeds are in some cases sufficient delivery of possession of the thing. Hunter's Roman Law, 137.

[3] D. 6, 1, 77.

[4] Digest, 21, 1.

[5] Pritchard's Ortolan, 624.

[6] Reeve's His. of Eng. law. Crabbe's His. of Eng. law.

to the proper heir or the eldest son of the lessee to the exclusion of the other lineal descendants of the latter. Then, again, land which is comprised in a partnership concern descends on the death of a partner not to the eldest son alone, but to all the children equally. In *Phillips* v. *Phillips*,[1] Sir J. Leach, M. R. observed :—" Real estate purchased with partnership capital for the purposes of the joint trade is personal estate, and in respect of the share of a deceased partner retains that character as between his real and personal representatives." Conversely, all moveable things do not possess the same legal incidents. As was said in Richard Liford's case[2] :—" If I have a manor in which there is a park and fish pond, the deer and the fish are to be regarded as a part of the inheritance. If a man has an horse-mill, and the miller takes the mill-stone out of the mill to the intent to pick it to grind the better, yet it remains part of the mill, as if it had been always lying upon the other stone, and by conveyance of the lease or conveyance of the mill, it shall pass with it. So of doors, windows, rings, keys, &c, although they are distinct things, yet they shall pass with the house, *à fortiori* the trees which are growing in the inheritance shall pass with it." So, moveable things of the nature of heir-looms, family pictures, statues and the like, are understood to go with the inheritance, and are thus included in real property.

The actual division of property in English law is into real and personal. Bracton, who borrowed much from Roman jurisprudence,[3] distinguished actions, in the language of civil law, into actions *in rem* and actions *in personam*. In the time of Edward IV,[4] these were known by the appellations of real and personal actions. Actions taken for the recovery of lands and tenements were designated real actions, while those for the recovery of the thing in specie, or, in lieu thereof, some compensation or equivalent in the shape of damages, were denominated personal actions. Thus, it has been said, land or rather freehold in land came to be called Real property. There is another basis on which property is classified in English law, namely, into corporeal and incorporeal. This classification has been obtained, maybe with a greater degree of precision, from the Roman law. We have already premised that *res* or thing, according to Roman law, not only meant, what the name readily denotes, a physical or material object, but also the rights inherent in a person in respect of a material or non-material object. Hence there arose the division of things into corporeal and incorporeal. In the language of the Institutes,[5] some things are corporeal and others are incorporeal. " Corporeal things are those which are tangible by their nature, such as, land, gold, silver, and many another thing. Incorporeal things are those which are not tangible, such as a right of inheritance, usufruct, use, and obligations in whatever mode they may be contracted. It is not to the purpose that the inheritance contains corporeal things, the fruits which are

[1] My and K. 663.

[2] Coke's Rep, Part XI, 50.

[3] Maine's Ancient Law, 82.

[4] Crabbe, Eng. law, 404.

[5] Justinian, Lib 2, lit 2.

received by the usufructuary are corporeal, and that which is due to us by virtue of an obligation, is generally corporeal; but the very right of inheritance and the right of usufruct, the rights and the obligations are incorporeal. Amongst incorporeal things are also those rights of urban and rural estates which are called servitudes. The servitude of rural immoveables are, the right of passage for beasts or vehicles, the right of way, the right of passage for water. The servitudes of urban immovables are those which appertain to buildings, and they are said to be servitudes of urban immovables, because we term all edifices urban immoveables although really built in the country. Among these servitudes are the following: that a person has to support the weight of the adjoining house, that a neighbour should have the right of inserting a beam into my wall, that he has to receive, or not to receive, the water that drops from the roof, or that runs from the gutter of another man's house on to his building or into his court or drain; or that he is not to raise his house higher, or not to obstruct his neighbour's light."[1] It would seem, however, that servitudes were acquired by prescription, or length of time, in the same way as immoveable property, and were subject to the same rules as immoveables.[2] Such rights as these were classified as *jura in re aliena*, or rights in another man's property. This division of things into corporeal and incorporeal in the Roman law is a somewhat grotesque division, and arises from the ambiguity which is found to exist in the term *res* as in its English equivalent property. Upon this principle of division the proposition, "this book is mine" would imply both a corporeal and an incorporeal thing. The book as the object of my proprietory right is a corporeal thing, but my proprietory right, of which the book is the object, is an incorporeal thing. The very essence of a thing, moreover,[3] is that it belongs to the material universe, and that it has a body or is corporeal. Hence, strictly speaking, an incorporeal thing is a contradiction in terms; but by "a humorous honesty," as has been quaintly observed,[4] certain rights are in modern jurisprudence metaphorically denominated, incorporeal or intangible things. In English law, advowsons, tithes, commons, offices, dignities, franchises, annuities, and rent charges are considered as incorporeal things, and are for all purposes the same as rights of ownership in real-estate. And Copyright and Patent-right may be cited as incorporeal things which form the incidents of personal property. In English law, we have also the words "tenement" and "hereditament" as designative of real property: tenement means that which can be held; by hereditament is meant property that will descend to

[1] Justinian, Lib. II, lit. 3.

[2] Hunter's Roman Law, 249.

[3] *Lucretius, De Rerum Naturâ*, Lib. V, 305, "*Tangera enim, et tangi nisi corpus nulla potest res.*"

[4] Amos on Jurisprudence, 141.

the heir-at-law. There is a particular class of things in English law which are, if one may be allowed to use the expression, of an amphibious nature. "Even if the distinction of things into moveable and immoveable be," in the words of Professor Amos, "ever so rigidly adopted, there must be an intermediate class, either created apart or provisionally sorted with one of the others, of things which are for a time immoveable, but afterwards, with or without change of nature, cease to be so. To this class belong the things in modern times becoming of inordinate importance denominated, Fixtures." The things which are called fixtures fall under the maxim, "*Quidquid plantatur solo solo cedit*, in common with trees, emblements, and away going crops. We shall first of all deal with fixtures. The word, fixture, has nowhere been very precisely defined.[1] It is, however, well-known that moveables may accede to immoveables, and the question would arise, as to what should be the incidents of such moveables. One of the earliest cases I have been able to discover is Herlakenden's case.[2] It was there said that "glass annexed to windows is a parcel of the house, and shall descend as parcel of the inheritance to the heir, and that the executor should not have them, and although the lessee himself at his own cost put the glass in the windows, yet it being once parcel of the house, he could not take it away or waste it; but he should be punished in waste. In *Warner* v. *Fleetwood*, it was resolved that glass annexed to windows by nails or in other manner by the lessee could not be removed by him, for without glass it would be no perfect house, and by lease or grant of the house, it should pass as parcel thereof, and that the heir should have it and not the executor." It was, likewise, then resolved, that "wainscot, be it annexed to the house by the lessor or lessee, is parcel of the house, and there is no difference in law if it be fastened by great nails or little nails or by screws or irons put through the posts or walls, the lessee cannot remove it. And so by lease or grant of the house (in the same manner as the ceiling or the plastering of the house) it shall pass as parcel of it." In Poole's case,[3] a tenant for years made an indenture of a house in Holborn to F. S., who was by trade a soap-boiler. F. S. for the convenience of his trade put up vats, coppers, tables, partitions &c. Upon a *fieri facias* against F. S., the sheriff took up all these things and left the house in a ruinous condition, so that the first lessee was liable to make it good; and, therefore, brought an action against the sheriff, and those that bought the goods, for damage done to the house. The question arose, whether these things having been attached to the ground were removable or went with the house and land. The following points were determined by Holt, C. J.: (*a*) that during the term the soap-boiler might well remove the vats he set up in relation to trade, and that he might do it by the common law in favour

[1] 2 Smith's Leading Cases, 169.

[2] Coke's Rep.

[3] 1 Salkeld Rep. 368.

of trade and to encourage industry; but after the term they became a gift in law to him in reversion and were not removeable; (*b*) that there was a difference between what the soap-boiler did to carry on his trade and what he did to complete the house, as hearths, and chimney-pieces which were not removeable; (*c*) that the sheriff might take them in execution and the under-lessee might remove them during the term. In *Lowton* v. *Lowton*,[1] the material question was, whether a fire-engine set up for the benefit of a colliery by a tenant for life shall be considered as personal estate or fixed to the freehold, and it was held that the fire-engine should be considered as part of the personal estate. In this case, the principle was for the first time clearly laid down that so long as the accessories could be taken away without destroying the principal thing, they would be deemed to be personalty and removeable. The observations of Lord Hardwicke are well worthy of attention for the manner in which they elucidate the law on the subject—"It does appear in evidence," continues the Lord Chancellor, "that in its own nature it is a personal moveable chattel; but then it has been insisted that fixing it in order to make it work, is properly an annexation to the freehold. To be sure, the old cases go a great way upon the annexation to the freehold, and so long ago as Henry VII's time, they construed even a copper and furnaces to be part of the freehold. Since that time, the general ground the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public to encourage tenants for life, to do what is advantageous to the estate during the term. What would have been held to be waste in Henry VII's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done. Coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed as fire-engines, and in brew-houses, specially, pipes must be laid through the walls and supported by walls, and yet notwithstanding this, as they are laid for the convenience of trade, *landlords will not be allowed to retain them.* In these cases public convenience has to be considered for determining the question. The good of the public is the material consideration which determines the court to construe these things personal estates, and is like the case of emblements, which shall go to the executors and not to the heirs or remaindermen, it being for the benefit of the kingdom which is interested in the produce of corn and other grain." A dictum occurs in the judgment to the effect that a brick wall may be removed which is erected as a shed. It was held in *Naylor* v. *Collinge*[2] that a thing which was let into the soil but was so constructed as to rest upon blocks and pattens was a mere chattel and as such, removeable.

It is obvious from these decisions that the tendency in modern times has been steadily to circumscribe the province of the maxim *quidquid plantatur solo*

[1] 3 Atkyn's Rep., 12.

[2] 1 Taunton's Rep., 21.

solo cedit. The Roman law on the subject of fixtures, as we shall find when we come to treat of the subject of lease, was developed on liberal principles, and so was the Brahmanic law; although the ancient dicta and maxims in both these systems of jurisprudance go to show that the accessories should be absorbed in the principal. "As plants," in the language of the Institutes,[1] "that unite with the earth go with the soil, so corn too that is sown is understood to go with the soil." In the laws of Manu, there occurs this aphorism, "the receptacle is more important than the seed."[2] The subject is of some importance in connection with the natural rights of lessors and lessees, mortgagors and mortgagees as we shall have occasion to explain afterwards.

Trees may be looked upon as partly moveable and partly immoveable. They partake of the character of immoveable when rooted to the ground; but are moveable at least for certain purposes when detached therefrom. By "emblements" are meant crops which may be growing on the land at the expiration of the tenancy, and, although attached to the soil, may be removed by the tenant under certain circumstances,[3] and thus the incident of emblements is an encroachment on the rule "*Quicquid plantatur solo solo cedit*" for the benefit of agriculture.[4] We shall revert to these terms afterwards; but one might usefully note in this place the rule laid down by Mr. Justice Blackstone that whatever is strongly affixed to the freehold and cannot be severed thence without violence or damage, *quod ex ædibus non facile revellitur.* is become a member of the freehold.[5]

In French law, all property is either moveable or immoveable. Property is immoveable either by its nature or by its destination, or by the objects to which it is applied. The soil of the earth and buildings are immoveable by their nature; wind or water-mills, fixed on pillars and forming part of a building, are also immoveable by their nature. Articles which the proprietor of a farm has placed thereon for the service and management of such a farm, are immoveable by destination, for example, among others, implements of husbandry, presses, coppers, tiles, vats and tubs, implements necessary for the working of forges, paper-mills and other machinery. A proprietor is considered to have attached moveable effects to his estate for ever, when they are fastened thereto by plaster, lime or cement, or when they cannot be separated without being broken and damaged, or without breaking, or injuring that part of the estate to which they are attached. The mirrors of an apartment are considered as fixed for permanent use when the frame-work on which they are fastened forms part of the body of the wainscot. It is the same with pictures and other ornaments. As regards statues, they are immoveable when they are placed in a niche formed expressly

[1] Justinian 2, 1, 12.

[2] बीजात् योनिर्गरीयसी, Manu, C. 9, 52.

[3] See *post.*

[4] *Graves* v *Weld*, 5 B. and Ad, 117 and 118.

[5] 2 Smith's Leading Cases, 186.

to receive them, although they may be capable of removal without breaking or damage. Immoveables in respect of the object to which they are applied are the usufruct of immoveable things, servitudes or agricultural services, and actions whose object is the recovery of immoveable property. Property is moveable by its nature or by the determination of the law. Moveable by their nature are bodies which may be transported from place to place; whether they move themselves like animals, or whether like inanimate things they are incapable of changing their place without the application of extrinsic force. Moveable by determination of law are bonds and actions relating to sums demandable. Moveables also by determination of law are perpetual or life annuities.[1]

The division of property into moveable and immoveable is generally observed in Europe and America. One or two peculiarities in connection with the subject are worthy of note.[2] In Greece, Holland and Louisiana, the materials proceeding from the demolition of an immovable thing and designed to reconstruct it are reckoned in the enumeration of immovables. Under the common law of Germany, even edifices according to certain customs were looked upon as moveables; the ancient definition of moveables being "all that which fire can consume."

In British India, we have not only the law which has been gradually built up by the British-Indian Legislature, but we have also for certain purposes, however limited their range may be, the Brahman and the Mussalman systems of law, generally known as the Hindu and the Mahomedan law. Under the Brahmanic law, property may be said to be divided not only into moveable and immoveable,[3] but into ancestral and self-acquired (पैतृक and स्वार्जित). By "ancestral" is meant that property which has been inherited from the father or forefathers. It was held, in *Rajmohun Gossain* v. *Gourmohun Gossain*,[4] that ancestral property is not confined to such property, if any, as the father has derived from his father or forefathers. The term, "self-acquired" may be said to be confined to such property as a coparcener may acquire without the use (उपघातेन) of ancestral property, and also the gain of science and learning. A father of a Mitákshará family, and in that term should be included the grandfather and the great-grandfather, may dispose of his self-acquired property in any way he likes. In such an act of alienation the son, the grandson or the great-grandson has no voice (पित्रार्जिते तु न निषेधाधिकारः)[5] Of ancestral moveables the father is the sole proprietor, but in ancestral immoveables the father's and the grandfather's right is controlled by that of the son or the grandson (स्थावरस्य तु सर्वस्य न पिता न पितामहः)[6] In the language of the commentator, "as for the text, the father is master of the gems,

[1] The Code Napoleon.

[2] *Les Codes civils étrangers*, par Saint Joseph. Introduction, xxxviii.

[3] स्थावर and अस्थावर

[4] 8 M. I. Ap. 97.

[5] Mitákshará, C. 1, s. 5, cl. 9.

[6] Mitákshará, C. 1, s. 1, cl. 21.

pearls and corals and of all other moveable property; but neither the father nor the grandfather is of the whole immoveable estate, it relates to immovables which have descended from the ancestors." But it is apparent from clause 27 of C. 1, s. 27 of the Mitácshará that the father is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor (स्थावरे तु स्वार्जिते पित्रादिप्राप्ते च पुत्रादीनाम पारतन्त्र्यमेव.). Under the Mithila law, which prevails in certain parts of Behar, a Hindu widow, according to Vachaspati Misra, has an absolute right to dispose of the inherited moveables; but she cannot touch the corpus of the immoveable except under necessity.[1] "Property given to her by her husband," observes Narada, "she may enjoy or give away after his death with the exception of lands or houses." There is a kind of property in Brahmanic law, which is called *nibandha*. The Anglo-Indian Courts have held this property to be immoveable property. *In Collector of Thana* v. *Krishna Nath Govind*, where the Peshwa by a sunnad had granted to a temple an annual sum of money derivable from the several *mehals* therein indicated, it was held that the allowance being of a fixed and permanent character would rank in Hindu law with immoveables.[2] A pension or other periodical payment or allowance granted in permanence is *nibandha* whether secured on land or not.[3]

Under the Mussulman system of law there is a distinction made between moveable and immoveable property (غير منقولة and منقولة), or that which can be removed from one place to another and that which cannot be so removed. The distinction, however, does not seem to lead to any very important consequences. The only cases, so far as I have been able to discover, in which the distinction is observed are (*a*) with reference to the extent and nature of the power of the grandfather, father or executor to dispose of immoveable property *(akár)*,[4] (*b*) with reference to a certain kind of sale (*salam* sale) which affects moveables only, (*c*) with reference to the law of pre-emption which relates to immoveables alone.[5]

Under the general law of British India, the distinction of property into moveable and immoveable is one of far-reaching consequences, it relates to succession, it relates to the mode of transfer, it relates to the limitary period of right or the question of limitation, it relates to the jurisdiction of courts, to the execution of decrees and the mode of execution.

First of all, let us consider the various definitions of immoveable and moveable property which are scattered over the many Acts of the British Indian

[1] Tagore's Vivada Chintamani, 261. See Birajun Kooer's case, I. L. R., 10, Cal. 392.

[2] I. L. R. 5 Bom. 322.

[3] 6 Bom. (F. B.) 546

[4] Tagore Lectures, 1874, 105—107.

[5] Hedáyah.

Legislature. It has to be generally observed that in those Acts which deal with immoveable property; but which at the same time do not give any definition of immoveable property or moveable property, for instance the Limitation Act, or the Civil Procedure Code, one must look for the definition of one or other kind of such property to the General Clauses' Act.[1] Clauses 5 and 6 of section 2 of that Act run as follows: Immoveable Property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth; Moveable Property shall mean property of every description, except Immoveable Property. In The Indian Succession Act,[2] Immoveable Property is defined to include land, incorporeal tenements and things attached to the earth or permanently fastened to anything which is attached to the earth; Moveable Property means property of every description except immoveable property.[3] In the Registration Act,[4] Immoveable property includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth or permanently attached to anything which is attached to the earth, but *not* standing timber, growing crop nor grass; Moveable Property includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description except immoveable property. In the Penal Code, immoveable property is not defined, beyond what is negatively implied in the definition of moveable property, which words are intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth.[5] In the Transfer of Property Act,[6] the term "property," as we have already had occasion to observe, is not defined; but the term "immoveable property" is negatively defined thus: Immoveable property does not include standing timber, growing crops or grass. Moveable property is not defined at all; but the phrase "attached to the earth" is thus explained: "attached to the earth" means (*a*) rooted in the earth as in the case of trees and shrubs, (*b*) imbedded in the earth as in the case of walls and buildings, or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Taking all these definitions together one cannot fail to notice sometimes a sort of discrepancy. "The words "moveable" and "immovable property," observes Macpherson, J. in *Nathu Miah* v. *Nand Rani*[7] have been defined in no less than five different Acts, and no two of the definitions given are precisely the same." For instance, trees and shrubs are obviously included in the definition of immoveable property in the General Clauses' Act; but it is by no means perfectly clear whether they are ex-

[1] Act I of 1868.
[2] Act X of 1865.
[3] Cf. s. 22 of the Indian Penal Code.
[4] Act III of 1877 as amended by Act XII of 1879.
[5] Penal Code, s 22.
[6] Act IV of 1882.
[7] 8 B. L. R., 523.

cluded from the definition of immoveable property in the Registration Act, though upon the well-known principle of construction which is suggested by the maxim, *expressio unius est exclusio alterius*, some kind of trees and shrubs may be said to be included in the definition of immoveable property as it is given in the Registration Act. The real difficulty, however, arises when we come to find that trees and shrubs, which are placed under a separate head by themselves in the Transfer of Property Act, are obviously included in the definition of Moveable Property in the Indian Succession Act, of which the Transfer of Property Act has been justly considered by the learned Commissioners as a sort of counterpart.

There is a clear distinction observed by the law of British India between rights of persons in the matter of succession with respect to moveable and immoveable property. S. 5 of the Succession Act is in these words: "Succession to the immoveble property in British India of a person deceased is regulated by the law of British India, wherever he may have his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death" This provision is based upon the principle of International law that immoveable property should be governed by the law of the place where it is situated, or *lex loci rei sitæ*, whereas moveable property should follow the law of the country of domicile.[1]

On the point of transfer, one need not do more than cite the formalities which the law insists upon in the conveyance of immoveable property. Whereas, as a general rule, a moveable thing may be transferred by delivery without more, the transfer of immoveable property, if of a certain value, must invariably be made under a document which would require to be registered, a gift of immoveable property, of whatever value, can be made only under a registered instrument.[2]

Again, it may be said generally that a right to moveable property may, under the Limitation Act, be extinguished after a period of three years, whereas it would require twelve years under the Act to destroy a person's right to immoveable property.[3]

With regard to the Courts in which relief must be sought, the distinction as to whether the property in respect of which the relief is sought is moveable or immoveable would regulate the jurisdiction. For instance, for the recovery of immoveable property, (except in certain matters of ejectment,)[4] or for the determination of any other right to, or interest in, immoveable property, no suit can be brought in the Courts of Small Causes.[5]

[1] Vattel, Lib 2, c. 8, s. 103, "mobilia personam sequuntur, immobilia situm."

[2] Registration Act, 17. Transfer of Property Act, 54.

[3] The Limitation Act Act XV of 1877

[4] Presidency Small Cause Courts' Act, 1882, ss. 41—44.

[5] Small Cause Courts' Acts.

The distinction in respect of execution of decrees, and the mode of execution is likewise observed in relation to properties, as they are moveable or immoveable. Upon this question we need only refer to the large number of rules in the Civil Procedure Code which regulate the principle and mode of execution of decrees in respect of moveable and immoveable properties. Ss. 296—327 of the Civil Procedure deal with these rules.

In the British-Indian Legislature, the principle of the division of things or property into tangible and intangible has also been clearly recognized. The Criminal Procedure Code uses the expression "tangible immoveable property."[1] In the Transfer of Property Act,[2] a distinction is drawn between tangible immovable property and an intangible thing, and the distinction, as will appear more fully afterwards, is of an essential nature; for the mode of transfer is unique in the case of an intangible thing. In the Indian Succession Act, the term "incorporeal tenement" is used as included in the definition of immoveable property. It consists of a right, not to the possession of the land itself, but to some benefit to arise out of it, such as rents, rights of way, rights to running water and the like.[3]

Again, the word "easement" is designative of a particular kind of property, and has been usually described as property in *re aliena* or in another man's property. It is, thus defined in the Limitation Act:[4] "Easement" includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon the land of another. Some of the things which relate to this right are enumerated in s. 26 of the Act as a few out of a class. Such as the use of light or air, way or water-course.

It may not be without use to explain that in English law a distinction is made between easements and *profits à prendre*. An easement under the English law is a right to do something in, or in respect of, another's land, or to prevent the owner of land from doing something on, or in respect of, his own land, whereas *profits à prendre* is a right to take something from another's land. The two kinds of rights are acquired by different sets of method.[5] The word "easement," as used in the Limitation Act, has a very much more extensive meaning than what the word bears in English law, for it includes any right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon, the land of another. An easement, therefore, embraces what, in English law, is called a *profit à prendre*, that is to say, a right to enjoy a profit out of the land of another; but, as is apparent,

[1] The Criminal Procedure Code ss. 145 and 147.

[2] S. 54.

[3] *Kesava Pillai* v. *Pedda Reddi*. 1 Mad. H. C. Rep, 258.

[4] Act XV of 1877, s. 2.

[5] Markby's Elements of Law, p. 208.

in a restricted sense. A prescriptive right of fishery has been held to be an easement under the Limitation Act, s. 3, and may be claimed by any one who can prove a user of it, that is to say, that he has of right claimed and enjoyed it without interruption for a period of twenty years, although he does not allege, and cannot prove, that he is or was in the possession, enjoytent or occupation of any dominant tenement. The result of this decision in *Chundee Churn Roy* v. *Shib Chunder Mundul*,[1] has been completely to do away with the technical refinements of English law with regard to the acquisition of things as they are *profits à prendre* or easements. The instances of *profits à prendre* in English law are the rights of common, of pasture, of piscary, of turbary, and of estovers, *i. e.*, of cutting wood in another man's land. The more important instances of easements are rights of way, rights to the use of water, to the free reception of light and air, to the support of buildings in respect of another man's land. *Profits à prendre* can be enjoyed by an individual in a thing, apart from his ownership of any other thing or land, that is to say, although he may not be the owner of a dominant tenement, or as it has been technically called, such rights may be enjoyed in "gross;" but it is different with regard to easements.[2] We have already had occasion to allude to a certain kind of anomalous property denominated as "fixtures" under the English law. The word "fixture" *eo nomine* does not occur in the British-Indian Legislature. I presume that the terms "fixtures" and "emblements" must be regarded as included in the phrase "attached to the earth" in s. 3 of the Transfer of Property Act. Broom, in his most useful and excellent work on Legal Maxims, treats of, under the maxim *quidquid plantatur solo solo cedit*, "trees," "emblements," "away going crops" and "fixtures." Trees in English law have been distinguished into trees which are timber and trees which are not timber. But it may be said generally that trees go with the land, as also young plants destined to become trees; but *bushes* and *underwood* may be appropriated by the tenant—"Emblements" are said to comprise not only corn sown, but roots planted and other annual artificial profits of the land which are in certain cases treated as distinct from the realty, or the land on which they grow or are planted. And "away going crop" is defined to be the crop sown during the last year of tenancy, but not ripe until after its expiration.[3] The term "Fixtures," in *Elwes* v. *Maw*, has been defined to be things annexed to the soil or annexed to anything which is permanently attached to the soil. These may be viewed as real or personal, as they can or cannot be removed without injury to the soil or to the fabric of the building.[4] The phrase "attached to the earth" is meant in the Transfer of Property Act "to include things instanced there as having incidents peculiar to themselves. Mr. Stokes, in his edition of The Indian Succession Act, treats the words "things

[1] I. L. R., 5 Cal., 945.

[2] Holland's Jurisprudence, pp. 165—167.

[3] Broom's Legal Maxims, 412.

[4] *Elwes* v *Maw*, 3 East, 38.

attached to the earth or permanently fastened to anything which is attached to the earth," in the definition of immoveable property there given, as though they were used for "fixture."[1] The question about "fixtures" arose incidentally in several cases in Bengal. In *Raj Chandra Bose* v. *Dharmo Chandra Bose*,[2] the point referred to the Court was, whether a tiled hut would answer the description of moveable property as defined, or rather described, in the then Small Cause Court Act.[3] Peacock, C. J., was there of opinion that a hut was not a moveable property within the meaning of the Act, and enunciated a distinction between the word "moveable" in the Act, and the word "removeable." The object of drawing this distinction was obviously to show that altogether by the custom of the country a tenant was at liberty to remove the materials or the fabric of the hut, and thus in a sense the hut was removeable, yet it was not moveable property so long as it remained attached to the ground. This distinction, as was subsequently pointed out, in *Nathu Miah* v. *Nand Rani*,[4] by Couch C. J., had been noticed in *Lee* v. *Risdon*.[5] At page 518 of the Report, Couch C. J. says:—"Any one acquainted with the decisions of the English Courts will know the great difficulty of making a distinction between moveable and immoveable property in the case of fixtures, which, although coming within the definition of immoveables, belong to the executor and not to the heir." The intention of the learned Judge was, if I may be allowed to say so, to point out that in English law it has not always been clear whether "fixtures" were real property or personal property; for, as has been already pointed out, neither all moveables are, under that law, personal property, nor all immovables real property. At page 519, the judgment proceeds:—"There are several decisions that seem to have favoured the view that, in considering whether huts are moveable or immoveable property, the usage of the country must be taken into consideration. At one time during the argument, I was inclined to take this view of the question, but after considering the matter, it seems to me that the actual annexation and total disconnection of the thing is the most certain and practical rule." It was ultimately held by the Full Bench that for the purposes of the Small Cause Court Act a hut was not moveable property.

There is an important case[6] where the question of "fixtures" came directly before the Court. There the Official Assignee brought a suit to recover damages for the removal of certain flour and oil mills and a steam-engine, boiler and other accessory machinery by which the mills were worked of which the defendants were the purchasers at a sale in execution of a decree of the Calcutta Small Cause Court against one Hurronath Mozoomdar of whose estate the

[1] Stokes's Indian Succession Act, Index.—Fixture.

[2] 8 B. L. R., 510, 511 note.

[3] Act XI of 1865.

[4] 8 B. L. R., 518.

[5] 7 Taunt 188.

[6] *Miller* v. *Brindabun*, I. L. R., 4 Cal., 946.

plaintiff had since become assignee. The question which came directly for decision there was whether the flour and oil mills, the steam-engine, the boiler, and other accessory machinery were goods and chattels within the meaning of s. 58 of Act IX of 1850, and as such could be taken in execution of a decree of the Small Cause Court. Several objections were raised in that case to the validity of the sale and removal, and the judgment of the court (Wilson, J.) which disposed of one of these objections as the material one, was as follows:—"It was said that such things are not goods and chattels within the meaning of s. 58 of Act IX of 1850. Now, I think it clear that the things in question, bedded and fixed as they were, were what are called in English law fixtures, that is to say, so annexed to the soil that they could not be severed and removed without substantial disturbance of the soil, and a substantial change in the character of the articles themselves. The case of *Kalipershad Singh* v. *Hulas Chand*,[1] is an express decision that the words "goods and chattels" in the section in question are used in their strict sense, and do not include fixtures: as, in the earlier case of *Nathu Miah* v. *Nand Rani*, it had been held, that fixtures are not moveable or personal property within the meaning of the Mofussil Small Cause Court Act. What is said in answer is, that though these were fixtures, they were trade fixtures, such as, according to English law, a tenant might remove as against his landlord, and such as might be taken in execution in England for the tenant's debt, and I think they would be held to be trade fixtures under English law. But the only thing we are concerned with, is the meaning of the words "goods and chattels," and I can see no reason why the English doctrine, as to the trade fixtures, and other fixtures should be imported into the matter."

It is worthy of note that it has since been enacted by s. 28 of the Presidency Small Cause Courts Act of 1882 that tiled huts, and other things which under the English law would be treated as trade fixtures, may be taken in execution of a decree of the Small Cause Court, and shall be deemed *quoad hoc* to be "moveable property." S. 28 runs thus:—When the judgment-debtor under a decree of the Small Cause Court is a tenant of immoveable property, anything attached to such property, and which he might, before the termination of his tenancy lawfully remove without the permission of his landlord, shall, for the purpose of the execution of such decree, be deemed to be 'moveable property,' and may, if sold in such execution, be severed by the purchaser, but shall not be removed by him from the property until he has done to the property whatever the judgment-debtor would have been bound to do to it if he had removed such thing." Tiled huts are understood to be included in the enactment.[2] We shall have to deal with this subject, afterwards, in connection with the rights of the lessee under the Transfer of Property Act.

[1] 10 B. L. R., 448.

[2] McEwen's Practice of the Presidency Court of Small Causes, 46.

We have already had occasion to observe that among incorporeal things which partake of the nature of personal property in English law are included Patent-right and Copy-right. In modern times, the inventor of a new process obtains from the State, by way of recompense for the benefit he has conferred upon society, and in order to encourage others to follow his example, not only an exclusive privilege of using the new process for a fixed term of years; but also the right of letting or selling his privilege to another. Such an indulgence is called a Patent-right. And a very similar favour known as Copy-right is granted to the author of books, and to painters, engravers and sculptors in the production of their genius. In British India, the subject of Patent-rights and Copy-rights are treated of under special legislation.[1] The right to use a particular trade-mark will evidently come under Patent-right.[2] The goodwill of a business is an instance of an incorporeal moveable thing, and in the words of Lord Eldon[3] is recognized in equity as a valuable interst. The sale of the goodwill of a trade takes into account the probability that the old customers will resort to the old place, and in view thereof the former owners may be restrained, in derogation, seemingly, of the inherent right of all to exercise any legitimate profession or calling, and of the general rule that all contracts of such a nature are inhibited, from pursuing a business which will render it valueless to the purchasers. Section 27 of the Contract Act, while prohibiting any restraint upon the exercise of a lawful profession, trade or business, thus marks out an exception:—"one who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the court reasonable, regard being had to the nature of the business."[4]

[1] As to copy-right which relates to books, including magazines, reviews, essays &c., See Act XX of 1847. As to Patent-rights which deal with new manufacture, See Act XV of 1859 also Act XIII of 1872.

[2] *Hall* v *Barrows*, 33 L. J., Ch. 204.

[3] *Crawshay* v. *Collins*, 15 Vesey, 224, 227.

[4] The Contract Act.—Act IX of 1872.

LECTURE V.

OWNERSHIP AND POSSESSION.

The Qualities of Property—*Yathesta-Viniyoga* and *Dominium*—In ancient times, owner or no owner—Ownership now capable of division—*Jus utendi, abutendi, fruendi,* and *vindicandi*--Possession—*Ishan Chunder Behara* v *Ramlochan Behara*—Paul's definition of Possession—*Corpus et animus*—Ulpian on Possession—Savigny's view of the Roman notion of possession—Professor Hunter's Criticism—Confusion in Roman law—M. Ortolan's exposition—Brahmanic notion of Possession—*Bhukti* or *Sambhoga*—Possession, *primâ facie* evidence of title—*Agama* or title—Mussulman notion, *qabza* and *tasarraf*—Shafei's idea of possession—English and European Jurisprudence—*Catteris* v. *Cowper*—*Raja Padda Vencatapa Naidoo* v. *Aroovala Rudrupa Naidoo*—*Young* v. *Hichens*—Representative possession, Derivative possession, Constructive possession, Joint possession, Symbolical possession—*Hurruck Narain Singh* v. *Lachmi Bux Roy*—*Krishna Govind Dhur* v. *Hari Chunder Dhur*—*Coverdale* v. *Charlton*—*Juggo Bandhu Mookerjee* v. *Ram Chunder Bysack*—Lalubhai Surchand's case—Fact of Possession and Right to Possession—*Doe* v. *Dyeball*—Possession, Criminal Procedure Code—Specific Relief Act, s. 9—Possessory Suit—*Interdictum Unde Vi*—Kumbi Kamafa Karufer's case—Peacock, C. J., his observation on possession.

Things or objects of ownership may be variously classified; but they all possess in common certain prominent legal attributes, just as things we perceive about us in nature are understood to possess certain essential physical attributes. As the human mind refuses to recognize a thing except by means of the physical qualities of colour, shape, taste and the like; so the law will decline to take any account of a thing except by means of certain appropriate qualities or legal incidents. What those qualities or legal incidents are, will appear from a close analysis of the conception of ownership. The Brahmanic *yathesta-viniyoga*, as the Roman *dominium*, signifies the fullest power of application or disposal of a thing which the law will recognize. In the language of the Roman jurisconsults, *dominium* is the right of using, enjoying and disposing of a thing to the extent the reason of the law will brook.[1] In the words of the Brahmanic glossators, the use and the disposal of a thing are circumscribed by law.[2] There is abundant evidence, if ancient literature and records of custom can be said to furnish a reliable source of information, that, in early times, a person was an owner or no owner at all.[3] Ownership was then inalienable and indivisible, and thus the inquiry who was in possession of a thing and who was

[1] 2 Ortolan's Institutes of Justinian, 256 n. (1).

[2] विनियोगोऽस्य सर्व्वस्य शास्त्रेनैव नियम्यते, Viramitrodaya, c. 1, s. 17, cl. 2.

[3] See, Lecture 1, Introduction.

the owner of it, would have been wholly unprofitable and out of place. In modern times and under modern systems of jurisprudence, ownership has been understood to be not only capable of absolute alienation; but also capable of division. The same thing, for instance, may form the subject of various rights in a number of persons in varying proportions. It is enough to cite, at present, the examples of mortgagors and mortgagees, lessors and lessees, life-tenants and reversioners. In order to determine the mode and the proportion in which a thing may be held or enjoyed by a number of persons independently of each other, it becomes necessary to investigate the constituent elements of ownership. *Dominium*, in its technical sense of full ownership, signifies that absolute power which the owner may have over a thing, in other words *plenam in re potestatem*.[1] The elements which compose the full or entire power may be thus enumerated:—the power of holding or possessing the thing, the power of drawing from it all the services which it is capable of rendering, the power of altering it, dividing it, alienating it, or consuming it subject of course to legal restrictions, and lastly, the power of claiming it in the hands of others. This, it will at once be observed, is nothing more than a periphrasis of those convenient and terse expressions of the Roman lawyers, some of which have already been alluded to, namely, *jus utendi*, *jus fruendi*, *jus abutendi*, and, what M. Ortolan has properly called the sanction of all these rights, *jus vindicandi*.[2] Thus the owner of a house can dwell in it *(jus utendi)*; he can let it and receive the rents *(jus fruendi)*; he can sell it, make a gift of it, and even demolish it *(jus abutendi)*; and lastly he can claim it in a court of justice against all detainers (*jus vindicandi*). When all these rights exist in one and the same person, he is known as the full owner, and the aggregate or congeries of these rights is described as full ownership, or, in the language of Roman law, *plena potestas*. "These rights may be severed one from the other", says M. Ortolan, "and belong in bits or fragments to different persons; but, in every case of dismemberment, we are in the habit of regarding the power of disposing of the thing, namely, the *jus abutendi*, as the primary power, the essential element of ownership; we always consider him to be the proprietor who retains this power, and call the thing his, the others are merely the users or receivers of the fruits." On close examination, it will appear that the proposition, though popular, is by no means comprehensive of all the various forms and legal conceptions of ownership. When one compares the respective rights of the mortgagor and the mortgagee, one at once finds that it is a palpable misuse of language to say that the mortgagor is alone the owner during the subsistence of the mortgage, and that the mortgagee is in no sense an owner. Suppose the mortgaged property is a dwelling house, can it be said that the mortgagor may demolish it at his pleasure? Or suppose I pledge my watch with you, there can be no doubt that you continue to be a sort of owner until the watch is redeemed, and were

[1] 2 Ortolan's Institutes of Justinian, 255.

[2] *Ibid.*, 256.

I, in the meantime, to take the article away from your possession and without your consent, I would be guilty of theft. In cases such as these, who is the owner or proprietor? Certainly both the mortgagor and the mortgagee, the pawner and the pawnee are owners or proprietors in a limited sense, and, indeed, none of these persons can be said to have the *jus abutendi* in the fullest sense during the period of the mortgage or pledge; although each of these persons may have the right of alienating the thing in a limited way. Some of the fragments or elements of property are to be met with in each of these persons. Each of these persons has a special property in the thing, and is, therefore, an owner in a particular way.

Now, in dealing with the subject of property one cannot lose sight of a certain aspect of it which is known as possession. We find that the question of possession is a great deal mixed up with the question of ownership. Note the observation of Dwarika Nath Mitter J. in *Ishan Chunder Behara* v. *Ram Lochun Behara.*[1] That was a case in which the plaintiff sued for the recovery of a certain land; the defendant claimed the land as his own and pleaded limitation. One of the witnesses for the plaintiff stated that the latter had been *in possession*, and that the defendant had dispossessed him within the limitary period. Mitter J. rejected the evidence with the following remark:— "Now it is quite clear that a mere statement by a witness to the effect that a party *is in possession*, strictly speaking, is no evidence of possession. The question of possession is a mixed question of fact and law. The evidence produced on the point must give *the various acts of ownership* which go to constitute possession." This observation unmistakably points to the conclusion that *possession* after all is composed of certain elements of ownership. The term, possession, however, has been used in such a variety of ways, and has been so frequently discussed, that it will not be unreasonable to give a brief history of the term, the various forms in which it is used and its consequences. One whole Title in the Digest[2] has been devoted by Justinian to the subject of possession, and modern jurists have taken considerable pains to elucidate the expression. Nor is the question wholly devoid of practical importance, and much difficulty has frequently arisen in determining what will constitute "delivery of possession."

In *Vasudev Bhat* v. *Narayan Daji Damle*,[3] the question that was propounded was, whether registration of an instrument of gift by the parties to it can be regarded as in any sense equivalent to a delivery of possession. Sargeant, C J there said: "It is, doubtless, an act more or less public on the part of the donor

[1] 9 W. R, 80.

[2] Digest 41, II, *De Acquirendâ Vel Amittendâ Possessione.*

[3] I. L. R, 7 Bom., 132.

affording additional evidence of his intention to give the land; but so far as the delivery of the land by the donor or possession of it by the donee is concerned, it leaves the donee precisely in the same position as he was immediately after the donor signed the instrument. It neither gives him actual or constructive or symbolical possession, and cannot, therefore, we think be regarded as equivalent to delivery and acceptance." This was a case, which was one that affected the title of gift under the Hindu law. It is needless to repeat that in ancient times when property was inalienable and indivisible, and when physical contact with another's land was, indeed, deemed to be a sacrilege, physical contact would furnish the most indubitable proof of ownership. As soon, however, as the religious notion of property began to give way to secular ideas, it is evident that physical contact with property also began to lose its probative force. And the distinction would then for the first time suggest itself between physical contact or possession on the one hand, and ownership on the other. In all old systems of law, transfer of ownership is inseparably associated with actual delivery of possession, or putting the transferee in physical contact, as far as possible, with the thing transferred. In the Roman as well as in the Brahmanic law, it was incumbent on the parties to the transfer to point to, and, sometimes, even to touch or grasp *(manu capere)* the thing which was the subject of transfer, and pronounce certain words indicative of ownership, as for instance, "this slave is henceforth mine," or "this land will henceforth belong to me;" or conversely, "I relinquish this land in your favour" and the like[1] "Let him," observes Vijnaneshwara, speaking of transfer by gift, "give the skin of an antelope by holding its tail, a cow in the same manner, an elephant by his forelegs, a horse by his mane, and a slave girl by her head."[2] One readily discerns the analogy in the *livery* of seisin of the old English law. *Livery* in deed was performed "by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of land," the delivery being accompanied by such words as these, "here I deliver you seisin and possession of this house or land."[3]

The term "possession" has been obtained from the Roman law. "*Possessio*," observes Paul, "is so called from *sedes*, or a thing sat upon; for that is the natural way a thing is held by a person."[4] *Sedes* (from *sedere* = to sit) is explained to be a thing on which one can rest one's body or one's foot (*a pedis sedibus*). The word, *possidere*, probably means to sit firmly in its literal sense. The particle *po*, for the word was originally spelt only with one *s*, is apparently connected with "*post*" or "*pone*" which signifies "after" or "behind," and

[1] Hunter's Roman Law, 115.

[2] Mitákshará, c. iii, s. 6, cl. 37.

[3] William's Real Property, 142.

[4] *Possessio appellata est, ut et Labeo ait, a sedibus, quasi positio, quia naturaliter tenetur ab eo qui ei insistit*, D, 41, 2, 1.

may be supposed to intensify the simple signification of *sedes*.[1] Having explained the etymology of the word, Paul next proceeds to quote the observation of Nerva filius:—"the ownership *(dominium)* of things must have had their origin in natural possession *(ex naturali possessione)*; for instance, even now property in things whether of the earth, the air, or the sea may be so acquired, and such things are known to belong to those who have been the first to seize possession of them *(possessionem adprehenderint)*." Again, "those things can be possessed *(possideri)*, or become objects of possession, which are corporeal, and we obtain possession not only with the body, but also with the mind, and not with the body alone or the mind alone *(Possideri autem possunt, quæ sunt corporalia. Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore)*." It appears from the next passage in which Paulus illustrates "possession" that bodily contact at least with a portion of the land is essential to the transfer of possession of the whole, so long as there is an intention to take the thing in exclusion of others. "It is not necessary," observes the jurist, "that a man should walk round the whole land in order to take possession of it; it is sufficient for him to enter some portion of the land with the intention or thought of taking the whole." *(Non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficiat quamlibet partem ejus fundi introire dum mente et cogitatione hac est uti totum fundum usque ad terminum velit possidere)*." Ulpian, another classical jurist, citing with commendation the language of Pomponius, thus distinguishes "possessio" or possession, from *dominium*, *proprietas* or property:—Suppose a boat carrying some blocks of marble belonging to me was wrecked in the Tiber, and after a time the marble was recovered, will the *dominium* or ownership continue in me unaffected during the time of the wreck? I should think that the *dominium* or ownership all along remained in me; but not so the possession (*Ego dominium me retinere puto, possessionem non puto*).[1] The ownership or *dominium* here spoken of is, what is known in Roman law, as *nuda proprietas* or bare ownership, which might best be described as an ownership divested of its most essential and practical element, namely, the actual power of enjoying a thing; for, in the words of Ulpian,[2] he is naturally said to possess a thing who has the use and enjoyment of it (*naturaliter videtur possidere is qui usum fructum habet*). There has been much discussion on the subject of the Roman conception of possession, and Savigny and others have with the aid of the most elaborate arguments endeavoured to show that mere physical contact is in no sense a rational ingredient of possession, and a good deal is made of the well-known illustration of Paulus that it is absurd to suppose a man who is asleep to be in possession of a thing merely because it is put into his hand (*sicuti*

[1] Dr. Smith in his Dictionary considers the particle to represent the root "*pot*" in "*possum*."

[2] D 41, 2, 13

[3] D 41, 2, 12

si quis dormienti aliquid in manu ponat.) One single passage in the Digest[1] which professes to lay down the dictum of Papinian is sufficient to show that the distinction the Roman jurists were really anxious to point out was the distinction between civil or legal possession on the one hand, and natural possession on the other. All that they contended for, and meant to say was, that mere corporeal contact may deceive the untrained eye, and lead people to confound natural possession with legal possession. These are the words of Papinian "*Qui in aliená potestate sunt habere possidere non possunt, quia possessio non tantum corporis, sed et juris est,*" that is, those who are in the power of others are not able to have anything, therefore they can not be said to possess a thing, for possession is not merely a physical act, it is a matter of right or law. The whole question, therefore, resolves itself into this—what is possession in the eye of the law, and that is a question which is of no less interest in modern jurisprudence than it was in the time of the Romans. If we accept the explanation of Papinian as the true explanation of the Roman notion of possession in its different phases, some at least of the confusion which modern authors on this subject have found in the writings of many Romans jurists is got rid of. Upon the explanation of Papinian, natural possession, then, becomes merely detention without the notion of right, and which the law will scarcely respect. Detention is nothing more than the holding of a thing without any of the elements or particles of ownership, whereas legal possession contains within it some at least of the elements of actual ownership, and when all the elements of owership exist in legal possession, such legal possession amounts to full ownership. I shall here subjoin Savigny's summary of the result of the arguments of the Roman jurists on the subject with Professor Hunter's criticism thereon: "Savigny has endeavoured to show that the language of the Roman jurists is clear and consistent. According to him, the varying phraseology of the Digest may be reduced to three heads, (*a*) *Civilis Possessio*, or such possession as ripens by prescription into ownership (*Possessio ad usucapionem*), (*b*) *Possessio* (simply) is such possession as never passes into ownership, but is protected by interdicts, (*Possessio ad interdicta*, or, as we should now say, "injunction"), (*c*) *Naturalis possessio*, or detention, is mere occupation unsupported by any interdicts. But in Digest 10, 4, 3, 15, a mortgagee is said to have merely *naturalis possessio*, although a mortgagee was protected by interdicts, so a wife that held property given to her by her husband against the law prohibiting donations, was said to be *naturalis possessor;* but she was also a *possessor ad interdicta.* If Savigny had put forth his distinctions as those that the Roman jurists ought to have followed, he might have supported himself by very strong arguments; but his mistake is in attributing to them a greater uniformity and precision of language than can be justified by a careful reading of the texts."[2]

[1] D. 41, 2, 49.

[2] Hunter's Roman Law, 210, note 2.

The exposition of Roman law by M. Ortolan on the subject of possession, divested of all inconsistencies, is well worthy of attention; for it not only professes to furnish us with a lucid, though, perhaps, an ingenious, explanation of that law; but it may, in the main, be said to embody the principles of the law of possession which underlie the theory of possession in all advanced communities. "Physical possession," observes that most learned author, "divested of all notions of right is only a fact. It is the actual or physical detention or occupation of a thing; the intention of the detainer or occupier counts for nothing. Jurisconsults have called such possession by the name of *nuda detentio*, *naturalis possessio* or *corporalis possessio*. The same idea is also sometimes expressed by these words, *naturaliter possidere*, or *in possessione esse*. This fact, or mere fact, of possession, however, exercises some influence on the right; but it is not in this kind of possession one ordinarily finds the elements of possession properly so called *(possessio)*. Possession in the eye of the law is not only a fact, but it is also a right. The intention of the parties counts for much; mere physical detention is not essential to it *(Possessio non tantum corporis, sed juris est)*. The words which are expressive of such a possession are, *civiliter possidere*, *jure civili possidere*, or simply *possidere*. Two elements constitute this legal possession, namely, the fact of possession, and the intention to possess. The fact, however, is not limited to the mere physical detention or occupation of a thing; it is sufficient if the thing is within the range of one's free disposal *(à notre libre disposition)*. Let us turn to the etymology of the word "possession." *Possessio* is derived from *posse* = to be able, that is to say, it means power authority or control *(puissance)*. For instance, when the proprietor, in view of his shop where his goods are, which he wishes to deliver to me, hands me the keys; or when in view of his land he declares that he has given it up to me, although I might not have yet obtained physical possession of the goods or the plot of land, I have the possession of either of them in the eye of the law; because from that instant they are in my power or at my free disposal *(non est enim corpore et tactu necesse apprehendere possessionem, sed etiam oculis et affectu)*. By a slight extension of the idea, if my tenant or lessee, my representative, my son, or my slave should hold a thing in my name, although it is they who have the physical possession, yet as they hold the thing for me as if they were my instruments, it is I who have the legal fact of possession, because the thing is in the eye of the law at my disposal or under my control, albeit through their intervention *(la chose, aux yeux de la loi, est en quelque sorte à ma disposition, en ma puissance par leur intermédiaire)*. So much for the fact of possession. The intention *(animus)* consists in the will to possess the thing as master. Although the lessee, the borrower, and the agent have the physical possession of a thing, the real or legal possession is not in them, in the same way as a lunatic, an infant, or person asleep cannot be said to have real or legal possession of a thing, although

any one of them may hold the thing in his hand. The reason is, that neither of these persons has the intelligence or knowledge of the fact of possession, or, rather the mind to possess *(intellectus possidendi)*."[1] It will be proper to mention here that M. Ortolan uses the word, *detain*, in order to express "physical possession," whereas in order to express the idea of legal possession, he uses the word, *possession* simply. On the whole, it should be concluded that mere tactual or physical possession does not possess much weight in the contemplation of the law, nor does that kind of possession where one holds a thing in the name of another go for much. That possession which the law will recognize and guarantee is where a person has a thing within the range of his control with the intention of keeping the thing as his own. Such, indeed, was the Roman view of the doctrine of juridical possession or possession *par excellence*, and the Roman lawyers expressed the idea by means of the two words, *corpus et animus*, or the physical and the intellectual elemeuts of possession. It was the conjunction of the two elements of corporeal contact in its extended sense and the intention of exclusive enjoyment that constituted the legal possession of a thing.

It is refreshing to pass from the hopeless confusion of the Roman lawyers to the concise explanations of the Brahmans on the topic of possession. In the writings of the Brahman jurists, the word "possession," with its misleading, and somewhat troublesome, etymology, is dispensed with, and, with the copiousness which is characteristic of the Brahmin tongue, every notion descriptive of a particular kind of possession has a distinct name assigned to it. There is the case in which a person may acquire proprietary right by seizure *(parigraha)* or the *complete grasping* of a thing which either belongs to no one or is common to all. Note the text of Gautama:[2] "an owner is by inheritance, purchase, partition, seizure or finding" (स्वामी रिक्थक्रयसम्विभागपरिग्रहाधिगमेषु). Mitra Misra thus explains the word *parigraha*. *Parigraha* consists in appropriating grass, water, wood and the like appertaining to common tracts, such as forests—which have not been appropriated by any other.[3] *Parigraha* is, indubitably, the exact equivalent of the Roman term, *occupatio* (from *capio*, I take or seize), or the mode by which ownership was acquired in *res nullius*. The language of the Roman law, in the matter of acquisition by occupatio, is, that the thing must be well kept in within your power in order to be acquired *(custodia coercetur)*.[4] *Parigraha* is thus a mode or cause of acquisition in a certain kind of things; but the term which corresponds to the Roman lawyer's idea of legal possession, or rather what should be the true idea, is *sambhoga* or *bhukti* (सम्भोगः or भुक्तिः)

[1] M. Ortolan's Institutes of Justinian, 258.
[2] Mitákshára, 1, 1, 8, Viramitrodaya, 1, 13.
[3] Golápchandra Sástri's Viramitrodaya, 8.
[4] Justinian, Lib. 2, t. 1, 12.

from root *bhunj* (भुञ्ज) to enjoy or derive benefit from. *Sambhoga* = the act of reaping complete or full benefit.[1] Thus, the Brahmanic idea of possession is by no means prominently associated with bodily contact, it is placed upon the intelligible basis of the enjoyment of the produce of a thing. Such an idea of possession is exactly what commended itself to the understanding of Ulpian, whose dictum has been already cited, namely, "he seems to possess naturally who has the usufruct" *(naturaliter videtur possidere is qui usum fructum habet)*.[2] To the Brahman lawyers, possessien or *sambhoga* was one of the modes of evidence, or a presumption that he who was in possession was probably alse the owner. "Evidence," observes Yajnavalkya, "consists of writing, possession or witnesses" (प्रमाणं लिखितं भुक्तिः साक्षिणश्चेति कीर्तितम्).[3] In order to find out what possession would constitute ownership, or rather what evidence would prove that a particular possession did not amount to ownership, one would have to refer to the various texts of the law. Ownership and possession are according to the Brahman lawyer the mere creatures of, and prescribed by, the law.[4] Compare this view of the law of property with the observation of Bentham: "We shall see that there is no such thing as natural property, and that it is entirely the work of law, there is no image, no painting, no visible trait which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind."[5] The Brahmanic jurists are found to use the expression *káyikasvíkára* (कायिकस्वीकार)[6] which may be translated as "bodily appropriation." That bodily appropriation, however, is mentioned as the sign of possession, or usufructus (फलोपभोगलक्षणं).[7] What the Rishis contend is simply this that "possession" is nothing more than evidence of ownership, the probative force of it varying according to the circumstances prescribed by law. Possession in Brahmanic law is distinguished into possession with title, and possession without title. The word designative of this title is *ágamu* (आगमः). Manu in C. 8, v. 200 gives preference to *ágama* with *sambhoga* over mere *sambhoga*.

The real meaning of the word in this connection has not been precisely ascertained. According to a learned German author,[8] that meaning is "acquisition." The etymology of the word is clear. It consists of *á* (आ) and *gama* (गम) which may mean (i) "going round and round" or circumambit, or (ii) "from which anything comes or is derived." The meaning of the word, amongst

[1] Manu, c. 8, v. 200, Yajnavalkya, c. 2, v. 23.

[2] D. 41, 2, 12, 12.

[3] Yajnavalkya, c. 2, v. 22.

[4] See *ante*.

[5] Bentham's Theory of Legislation, 111.

[6] Mitákshará.

[7] *Ibid.*

[8] Stenzler, *Erwerb*. See, *Sabdakalpadruma*.

others, is given as "a radical syllable," and also as "a voucher, or written testimony." There is little doubt that the Brahmanic jurists used the word in the sense of "the root or cause of lawful possession."

The term employed by the Mussalman jurists for "possession" is *yad* (hand) or *qabzā* (قبضہ), *grasp*, and sometimes *tasarruf* (تصرف) from *sarf* which means indifferently, possession, use or disposal. "A right of property, according to our doctors," in the words of the Hidayah, "is not established in the thing given merely by means of the contract without a seizin *(qabza)*."[1]

However, in all the systems of jurisprudence, I am acquanted with, "possession," whatever may be the form of language in which it is used, is spoken of as evidence of title. Thus, Justinian lays down that the possession (the word used is *usucapio* = "the taking by use") of a moveable thing for three years and inmoveables for ten years, if the person in whom the title exists happens to be present, or twenty years if such person happens to be absent, will be regarded, to use our modern phraseology, as irrebuttable presumption of the ownership in the thing by the possessor or *usufructuary*, subject, however, to the proviso that a just cause of possession should have preceded (*justa causa possessionis*). Possession with the leading Brahmanic jurists is one of the modes of evidence, and Vijnaneshwara devotes three long sections in chapter III to the subject of possession as a source of evidence. According to Manu, whatever an owner actually sees another enjoy (भुज्यमानं) *without raising opposition*, he is not entitled to recover from the usufructuary.[2] It would seem, however, that with regard to land or boundary of land no length of possession could extinguish or create proprietary right.[3] Manu, however, lays down in clear language, that mere enjoyment without a shadow of a title will not extinguish or support proprietary right.[4] Yajnavalkya is more precise in his diction. According to him, if one were to see another enjoy one's land without saying a word for twenty years, one would lose his right to the land, in the case of moveables or other property (धनं) the right would be extinguished under similar circumstances in ten years.[5] He, too, makes a distinction in the case of boundaries; the right to which, according to him, can never be lost by any length of adverse possession, as one would say now.[6] He, also, echoes the words of Manu, that enjoyment without title is no proof;[7] but the necessity of an en-

[1] Hidáyah, iii, 291. Both the words, *yad* and *qabza* are used in the secondary sense of power.

[2] Manu, c. 8, v. 147.

[3] *Ibid*, v. 149.

[4] Manu, c. 8, v. 200.

[5] Yajnavalkya, c. 2, v. 24. Note, this is one of the rare instances in which the word *dhanam* is used in a restricted sense.

[6] *Ibid*, v. 25.

[7] *Ibid*, v. 29.

joyment, however brief, is insisted upon to support a title.[1] This aphorism was clearly suggested by reason of the difficulty that might otherwise arise in adjudicating between the conflicting rights of competing transferees. "According to Hindu law," it was said in Kachu Bayaji,[2] "a change of possession is necessary to complete a sale of corporeal property, in order to prevent successive purchasers from being cheated by successive sales of the same property and to obviate disputes as to what was really sold."

The commentary of Vijnaneshwara on the texts of Yajnavalkya is somewhat diffusive; but a few important points may be clearly gathered from his gloss, (i) that unauthorized or unlawful enjoyment, or enjoyment without any basis of title, can never furnish a conclusive proof of proprietary right;[3] (ii) that the case of an enjoyment beyond the memory of man, or from generation to generation, affords strong presumption of proprietary right; (iii) that the fact of enjoyment for twenty years in the case of immoveables, and ten years in the case of moveables, has merely the effect of depriving the owner of the fruits which may have been enjoyed during that period by the trespasser, provided the enjoyment took place in the view of the owner. The gloss, however, leaves no doubt in the mind that enjoyment is *primâ facie* evidence of title.

In the Hidáyah,[4] possession is treated of under the head of evidence: "if a person sees any article (excepting an adult male or female slave) in the hands *(yad)* of another, he may in such case lawfully attest its being the property of that other, because possession argues property, since in all causes *(asbab)* of property, such as sale or the like, possession is the argument of its existence." Shafei, indeed, lays down, although dissented from by the Hidáyah, that mere possession without *tasarruf*, or, as we should now say, the exercise of some act of ownership cannot argue property. It follows that, according to this Mussulman commentator, mere *qabza* or bodily possession, unless coupled with some enjoyment, does not afford any presumption of ownership. It may be well to add that it is at least doubtful whether title by adverse possession is at all recognized anywhere in Mussulman law.

In English law, as well as in the other systems of European law,[5] possession is *primâ* evidence of ownership "The presumption of right in a party who is in the possession of property," observes Mr. Best,[6] "or of that quasi-pos-

[1] *Ibid*, v. 27.

[2] I. L R, 10 Bom, 491.

[3] "He who enjoys without right even for many hundred years, the ruler of the earth should inflict on the sinner the punishment of a thief." Mitákshará, c. 3, s. 5, cl. 9.

[4] 2 Hedáya, Book, XXI, c. 2.

[5] *Les Codes Civils E'trangers, Saint Joseph*, Introduction, XCV.

[6] Best's Evidence, 477.

session of which rights only occasionally exerciseable are susceptible, is highly favoured in every system of jurisprudence; and seems to rest partly on principles of natural justice, and partly on public policy. By the law of England, possession or quasi-possession, as the case may be, is *primâ* evidence of property —*melior est conditio possidentis*," *i. e.*, in a competition of rights better is the position of the party in possession. In *Catteris* v. *Cowper*,[1] the action was one of trespass. The defendant pleaded the general issue. Upon the trial of the cause, it being proved that the defendant had entered the land and taken the produce, the question was made whether the plaintiff had proved such a possession of the *locus in quo* as would enable him to maintain the action. The *locus in quo* was a piece of waste land lying between the farm which the plaintiff rented and the river Ouse; it bore grass which every one cut who would, until within two years before the action, and the plaintiff's only title was, that two years since, he had taken possession and twice mowed the grass, and had since pastured a cow there. The defendants' case was, that "the first time the plaintiff cut the grass, he had boasted that he had cut hay off land for which he had paid neither rent nor taxes; that in a former year he had bought the hay cut by another man off this same land, and that a few years before the trial, in repairing the boundary fence of his farm he had encroached by his fence the land in question, and had frequently shown to other persons the boundaries of his farm as excluding this land." The defendant did not produce this evidence, because the learned judge, upon the statement of it, held it insufficient to disprove the plaintiff's title, for that there was evidence of sufficient possession against a wrong-doer, and a verdict was found for the plaintiff. Upon a motion for new trial, this was held to be a right verdict, the court observing, "the defendant stands neither on any former possession of his own, nor derives title under the possession of any other person; his only objection to the plaintiff's recovery is, that he has not proved the title he stood on, that his land was part of the farm he held; but no answer is given to the fact of his prior possession." In *Rayat Ram Panday* v. *Goberdhan Ram Panday*,[2] their Lordships observed, "now the ordinary presumption would be that possession went with the title, that presumption cannot of course be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession as there is here on the part of the respondents—opposed by evidence apparently strong also on the part of the appellant, their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of the case, be regarded." In *Rajah Pedda Vencatapa Naidoo* v. *Aroovala Roodrapa Naidoo*,[3] it is said that the title of possession must prevail until a good title is shown

[1] 4 Taunt, 547.
[2] 25 W. R. P. C. 30.
[3] 2 M. I. A. 515.

to the contrary. The observation of their Lordships, in *Jowala Buksh* v. *Dharam Singh*,[1] was to this effect, "the appellant was in possession of the estate. He and his father had held continued possession of it, his own possession had been unquestioned. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate, that is, a title which would give the claimant a right to the estate, failing the title impeached." That possession is *primâ facie* evidence of title is an undisputed proposition of every system of law; but the term, possession itself has nowhere been defined in any of the Acts of the British Indian Legislature. As the difficulty of defining the terms "property" and "ownership" was fully present to the minds of the authors of the Transfer of Property Act, so the difficulty of defining the term, possession, was no less recognized by the original framers of the Penal Code.[2] They believed it to be impossible to mark with precision, by any words, the circumstances which constituted possession. "It is easy to put cases," in the words of Lord Macaulay and his colleagues, "about which no doubt whatever exists, and about which the language of the lawyers and the multitude would be the same; it will hardly be doubted, for example, that a gentleman's watch lying on a table in his room is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner his silver forks, while in the hands of his guests, are still in his possession; and it will be as little doubted that his silver forks are not in his possession, when he has deposited them with a pawn-broker as a pledge; but between these extreme cases *lie many cases in which it is difficult to pronounce, with confidence, either that property is, or that it is not, in a person's possession.*" S. 27 of the Penal Code says nothing more than this that "when property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of the code." In *Empress* v. *Thacoor Dyal Singh*, Couch, C. J. observes,[3] "There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him." On the whole, it may be said that the idea of bodily contact is still associated in the minds of men with the conception of possession, and from which writers on jurisprudence have not been wholly able to escape.[4] One

[1] 10 M. I. A. 528.

[2] Copy of a Penal Code prepared by the Indian Law Company, 1837, page 175.

[3] I. L. R. 3234.

[4] MARKBY'S ELEMENTS OF LAW —Possession is said to be "the physical possibility of dealing with a thing as we like and of excluding others" SAVIGNY —"A man has the actual custody of all that is in his house, by reason of the complete and exclusive dominion which he has over it."

meets with almost everywhere, whether in the writings of modern jurists or in the decisions of learned judges, the difficulty of interpreting such terms as *custody*, *occupation* or *possession*. In *Young* v. *Hichens*,[1] the question arose as to the point of time when a person may be said to be in possession of a fish in the sea. It there appeared that the plaintiff had drawn his net practically round the fish leaving a space of about seven fathoms open, which he was about to close with a stop-net; that the boats belonging to the plaintiff were stationed at the opening, and splashing the water about for the purpose of terrifying the fish from passing through the opening, and at this time the defendant rowed his boat up to the opening, and the disturbance and taking of the fish complained of took place. The question left to the jury was, whether the fish were at that time in the plaintiff's possession? Denman, C. J. there observed, "whatever interpretation may be put upon such terms as *custody* and *possession*, the question will be, whether any custody or possession has been obtained here, I think it impossible to say that it had, until the party had actual power over the fish. Occupation, in the words of Bracton, is not confined to corporeal possession, a control is sufficient." The question that was discussed in the foregoing case was the question of the acquisition of property in things which had before belonged to nobody or *res nullius*, in the words of the Roman law. Seizure, *parigraha*, or occupation is the beginning of title in such things. Denman, C. J. accepted the explanation of Bracton who as usual had borrowed, in this instance, almost the very words of the Institutes,[2] that property in a *res nullius* does not arise until the thing is well within a person's control (*donec tua custodia coercetur.*) Possession, then, may safely be concluded to be some act of ownership with regard to a thing, or some enjoyment (फलभोगः), as has been repeatedly explained by the Bramhan lawyers. Evidence of possession, to use once more the words of Dwarkanath Mitter, J. in Ishan Chunder Behara,[3] must give the various acts of ownership which go to constitute possession. It would, indeed, appear that *possession* and *property* have sometimes been used as equivalent terms.[4]

The term, possession, has ,in English law, been variously used as designative of various facts. Possession denotes (i) an actual occupation or holding, (ii) a present right to occupy or hold, (iii) at the same time both actual occupation and detention, and the right to occupy or to hold, (iv) it is sometimes used, in the plural, to denote what can be possessed, (v) it is sometimes synonymous witb seisin, *e. g.* in the maxim, "the possession of the brother makes the sister an heiress" (*possessio fratris facit sororem esse hæredem*), (vi) the phrase "in possession" is used in the sense of *present*. Thus as regards the time of enjoyment, estates are divided into estates in possession and estates in expectancy, and with

[1] 6 Q. B., 606.
[2] Libr. II, til. 1, s. 12.
[3] 9 W. R., 80.
[4] 39 Geo. III, c. 35.

reference to the necessity of instituting proceedings to obtain actual possession, rights and things are divided into those in possession and those in action.[1] Note, also, such expressions as these:—representative possession, derivative possession, constructive possession, joint possession, symbolical possession, actual possession, and indirect possession. In representative possession, the immediate or apparent physical contact over a thing is in one person without any intention on his part to deal with it except under the direction of, or in consistence with, the desire of another person. The desire to use the thing as his own in exclusion of the rights of the proprietor is wholly absent from the mind of the possessor; as, for instance, the possession of the wife, servant, or clerk as explained in the Penal Code. "Because I possess in my own name," observes Celsus,[2] "I am able to possess in another's name; but to possess *(possidere)* is one thing and to possess in another's name *(alieno nomine possidere)* is a different thing." Thus, according to Roman law, bailees, tenants, usufructuaries, and other persons whose intention *(animus)* with respect to the thing was of the same kind were not possessors, although the holder of a pledge and a certain kind of leaseholder *(emphytenta)* were regarded as possessors. Such an extreme, and somewhat inconsistent, theory arose from the Roman lawyer's peculiar, and rather narrow, notion of an owner, or, at all events, from the Roman idea of owner as understood by Ortolan. Upon a dismemberment of the rights of ownership, and their allotment in different fragments among different persons, according to Ortolan, he is still considered the owner who has the power of disposing of the thing (*jus abutendi*), that being the principal power, or the essential element of the *dominium* (*on a toujours considéré le pouvoir de disposer de la chose comme le pouvoir principal, l'élément essentiel du domaine; on a toujours nommé propriétaire celui qui avait ce pouvoir.*)[3] The Roman lawyers must have overlooked the fact which was clearly discerned by Blackstone[4] that there is a special qualified property transferred by the bailor to the bailee, by the landlord to the tenant, and the lessor to the lessee generally. Modern writers on jurisprudence have given to such possession by the bailee, the tenant or the lessee, the name of derivative possession. The lessee, the mortgagee in possession, or the tenant, for instance, has each secured to him a special kind of property during the period of his lease or mortgage, and, therefore, they have a right to be protected in their possession as against the whole world, including the lessor, the mortgagor and the landlord. The various terms expressive of different kinds of possession are not always used with strict precision as was pointed out by Couch, C. J., in *Sutherland* v. *Crowdy*[5]:—"There may be cases," observed the learned Chief Justice, "in which a person may properly be said to be in possession, although there was no bodily possession

[1] Lindley's Jurisprudence, App., cxvii, cxviii.
[2] D. 41, 2, 18.
[3] 2 Ortolan's Institutes of Justinian, 256.
[4] 2 Blackstone's Com., 453.
[5] 18 W. R. Cr. 11.

by him. There is the case of a servant being in possession, and it may be said that when the servant is in possession, it is the possession of the master. So, also, if an occupier is paying rent, that is the possession of the landlord to whom he is paying the rent. For some purposes the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation; but still his possession is the possession of him by whose permission, either given by a lease or any other mode of letting, he holds the land, and to whom he pays the rent." This observation is supported in the Report by a passage from Domat which is in these words:—" * * * it is necessary to conclude that the true possession is properly speaking only that of the master; and that although others, besides the master, may have a right to detain the thing, such as, the tenant, the farmer, the usufructuary, who having a right to enjoy ought by consequence to have the detention of the thing; which in them is only a borrowed possession, or rather the master's own possession who possesses through them."[1] It was said in *Empress* v. *Thacoor Dyal Sing*,[2] that the right of collecting rents directly from the tenants was in fact possession; but where there was an intermediate holder who recovered rents from the rayats, there the possession was the possession of the farmer. In *Haruck Narain Singh* v. *Luchmi Bux Roy*,[3] Jackson, J puts the question of possession in a clear light. "It seems to me clear," observed that learned Judge, "that when a zemindar has let his lands or portion of them in farm, he, his farmers and the occupying rayats are all in their degree concerned in any dispute as to possession which may arise, and they may, and ought to be, respectively maintained in possession of the interests which they severally enjoy." Joint or concurrent possession deals with a peculiar set of facts. There the possession exists in several persons. The rights of possession, however, are still one and indivisible, and the persons of inherence, that is, the persons in whom the rights exist, though physically many, are, in the eye of the law, treated as one and the same individual. For instance, the possession of one member of a joint Mitákshára family is the possession of all the coparceners.[4] In joint tenancy, such as is known in English law, the possession of one of the tenants is also the possession of the other. In such a case, in the expressive language of the English law, every part of the property as well as the whole is in the possession of each of the coparceners or joint tenants, and, in the technical phrase of that law, such possession is known by the name of possession *per tout et per my*. And the result is that co-sharers must sue jointly for enhancement of rent or for ejectment.[5]

[1] *Ibid* p. 13.
[2] I. L. R. 3 Cal., 321.
[3] 5 C. L. R. 287.
[4] Jwala Bux's case, 10 M. I. A. 511.
[5] Rashbihari Mukerji's case, I. L. R., 11 Cal. 644.

The endeavour to distinguish these somewhat misleading expressions naturally gave rise to a conflict of decisions;[1] but the principle enunciated in *Krishna Govind Dhur* v. *Hari Churn Dhur*[2] will, however, help the student to obtain an accurate idea on the subject. In that case, the plaintiffs had purchased some land, which at the time when they acquired their title was subject to an *ijara* to certain persons. During the currency of the ijara, the ijaradars were dispossessed. The point was, whether the dispossession of the ijaradars was the dispossession of the plaintiffs, or, in other words, whether the possession of the ijaradars was the possession of the plaintiffs. The observation of Wilson J. was as follows:—"When did limitation begin to run against the plaintiffs? Did it run from the dispossession of the ijaradars or from the termination of the ijara? It appears to us that it clearly runs from the determination of the ijara. Prior to that date they (the plaintiffs) might possibly have a right to bring a suit for declaration of their title, and the court would have power probably in its discretion to give them a declaratory decree, *but they certainly had no power to sue for possession.*"

In *Coverdale* v. *Charlton*, the expressions, constructive possession, actual possession, nominal possession, and *de facto* possession are explained.[3] There, the question was, whether a certain person could be said to be in such possession of a private way, on which he under the urban authority had the right to graze his cattle, as to exclude others from grazing theirs: Lord Justice Bramwell observed:—"It is said that there is a *de facto* possession; but it is difficult to say that there is a *de facto* possession, where there is no possession except of those parts of the land which are in actual possession, and there is an interference with the enjoyment of the parts which are not in actual possession. My meaning is this, if there were an inclosed field, and a man had turned his cattle into it, and had locked the gate; he might well claim to have *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common. If it would not be a *de facto* possession, it would be a nominal possession. If no rights were attached to it, it would not be a constructive possession."

There remains the expression "symbolical possesssion," the nature and effect of which was thus explained in *Shoteenath Mukerjee* v. *Obhoy Nand Roy*.[4] There it appeared that, on the 31st July 1863, the plaintiffs had purchased in execution of a decree a half share in a certain house, which originally belonged to the defendants. They took no steps at the time to obtain possession; but in 1869 the nazir was directed to put them into possession, and he gave

[1] Sharat Sundari Debia's case, I. L. R. 13 Cal. 101.
[2] I. L. R. 9 Cal. 369.
[3] L. R. 4 Q. B. D. 118.
[4] I. L. R., 5, Cal., 333.

them what is called symbolical possession; but the plaintiffs not being satisfied with that, applied further to the court, and in August 1871, they succeeded with the assistance of the nazir, in obtaining ingress into one of the rooms in the house. They remained in such possession not for more than a minute, and the defendants did at once, or almost at once, resume possession, and continued in possession to the date of the suit. "As to the possession before 1871, if any," the Court proceeded, "it was what is called symbolical possession, that is to say, possession by sticking up of a bamboo or the like. That is not the mode of giving possession of a property like the present,—a family dwelling house. The purchasers ought to have asked for, and in order to save limitation, they ought to have obtained actual possession. Now, actual possession, if we suppose it could have been given in 1871, was not of a legal or regular kind, because it was at the intervention of the nazir, who had no more power in that case than any private individual." In *Juggobundhu Mukerjee* v. *Ram Chunder Bysack*,[1] it was observed that Sections 223 and 224 of the code point out the mode of executing decrees in suits for immoveable property; S. 223 applies when the land is in the actual possession of the fendant, S. 224 when it is in the occupation of the raiats. In the one case, the delivery of the land is to be made by placing the plaintiff in *direct* possession. In the other, the delivery is effected by the officer of the court by going through a certain process prescribed by S. 224, and proclaiming to the occupants of the property that the plaintiff has recovered it from the defendant." Further, in *Ranjit Singh* v. *Banwari Lall Sahu*,[2] it was said that the delivery in execution by means of symbolical possession "is an actual transfer of possession, when that is the only means by which, *as between the parties* the Court can effectuate and carry out its own decree." In Lokesur Koer's case,[3] it was said that *as between parties to the suit* the formal possession which the Civil Court gives under an execution operates in point of law and in fact as a complete transfer of actual possession from the one party to the other.

In the foregoing decisions, the question which the Courts were considering was really what would constitute delivery of possession. What constitutes delivery of possession has been the subject of frequent debate in the Courts, particularly in connection with what would constitute delivery of possession under the "Hindu" and "Mahomedan" laws. In *Lalubhai Surchand* v. *Bai Amrit*,[4] Mr. Justice West, in a most exhaustive judgment, comes to the conclusion that delivery of possession of the property sold is, under the Hindu Law, essential to complete the title of the vendee against a third party purchasing with possession from the same vendor without notice of the prior transaction." In order to

[1] I. L. R., 5, Cal., (F. B.) 588.
[2] I. L. R., 10, Cal., 995.
[3] I. L. R., 7 Cal. 420.
[4] I. L. R., 2. Bom. 299.

understand what is meant by delivery of possession, it is sufficient to bear in mind that the question in every case is more or less one of fact, and, therefore, the point for consideration is, whether a particular person has been put into such a position with respect to the property as it is possible to occupy in view of the circumstances of the property. In *Mohima Chunder Sircar* v. *Hurro Lal Sircar*,[1] it was said that "where land, the right to which is disputed, has been uninhabited and uncultivated, and no act of ownership by any person can be proved to have been exercised over it, it is often necessary, for the purpose of deciding the question of limitation, to rely upon slight evidence of possession and sometimes possession of the adjoining land coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming under such circumstances that the party who has the title has also the possession." In *Harjivan Anandram* v. *Narayan Haribhai*,[2] the competition was between the donee on the one hand, and the tenant of the donor on the other. The tenant resisted the suit for possession by the donee on the ground that he had cultivated the land for thirty years, and that he had never paid rent to the plaintiff on any occasion. Couch, C. J., there held that without possession or *receipt of rent* by the donee the gift was not complete. In *Dugai Debi* v. *Mathura Nath*[3] the point was put, if possible, more explicitly. It was there held that "a gift by a Hindu unaccompanied either by possession on the part of the donee, or any symbolical act, such as handing over documents of title or permitting the donee to receive rents, is not itself a valid transaction, even though the deed of gift be registered." We have seen that the term "possession" is used in various senses, and frequent discussions have arisen in respect of the legal effect which should be assigned to different sets of facts implied by the different denominations of possession. The Legislature itself seems to have drawn a distinction between the expressions, "actual possession" and "physical possession." In Article 10, Sched. II. of the present Limitation Act,[4] we have these words, "when the purchaser takes under the sale sought to be impeached *physical* possession of the whole of property sold;" in the former Act[5] the words were "*actual* possession."

The point, however, which is very essential to understand is the distinction which is observed between the expressions, "the fact of possession" and "the right to possess," or in the language of the Roman Law, between "*in possessione esse*" and "*possidere*." The mere fact of possession is not without significance in the eye of the law. It is understood to be an inflexible rule that in actions of ejectment, the plaintiff must recover by the strength of his own title; neverthe-

[1] I. L. R., 3 Cal 77.
[2] 4, Bom., H. R., 32.
[3] I. L. R., 9 Cal., 854.
[4] Act XV of 1877.
[5] Act IX of 1871.

less proof of prior possession has been regarded as *primâ facie* evidence of title.[1] In an action of trespass, possession is conclusive evidence of title against a wrong-doer.[2] It was held in *Davison* v. *Gent*[3] that "in ejectment against a person who has entered forcibly without any title, evidence of prior possession is sufficient to entitle the plaintiff to recover, and the plaintiff does not lose his right to insist on such possession by setting up a title which he fails to establish in proof." We have already had occasion to observe that the "fact of possession" is good against all the world except the person who can show a good title. It has been held in *Doe* v. *Dyeball*[4] that even one year's prior possession was good against a person who came and turned the plaintiff out. "This fact of possession" has been recognized by the British-Indian Legislature as a right in itself. Under, what is generally called, the possessory section of the Criminal Procedure Code,[5] "the Magistrate shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire and decide which party is in possession of the subject of dispute." An analogous provision occurs in the Specific Relief Act,[6] namely, "if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit." Here the words are clear that "the fact of possession" is in the nature of a title. In both the sections, a distinction has been drawn between two kinds of possession, namely, "a possession with merit" or a *moral* possession, and "a possession without merit" or a *non-moral* possession. A person may be entitled to the possession of a thing, or, in the language of the Roman Law, may have a *justa causa* for the possession of a thing, or *ágama* in the words of the Brahmin lawyers; but a person who has no *justa causa* or title, may, nevertheless, have a presumptive kind of proprietary right, and will under certain circumstances be maintained in possession even against the rightful owner.

In *Kunbi Komafa Kurafa* v. *Changarachu Kandil Chembata*,[7] the Court observed: "s. 15 of the Limitation Act[8] (which, it should be observed, corresponds with S. 9. of the Specific Relief Act) was not intended to abridge any right possessed by the plaintiff, but to give him the right, if dispossessed otherwise than by course of law, to have his possession restored without reference to the title which he holds, and that which the dispossessor asserts. In cases under that section, a lessor, who had dispossessed otherwise than by due course of law a lessee whose

[1] 1 Taylor's Evidence, 136.
[2] *Ibid.*, 135.
[3] 1 H. and N. 744.
[4] 1 Mood and M. 346.
[5] S. 530, of the old Code and S. 146, of the new Code.
[6] Act I of 1877, s. 9.
[7] 2 Mad., H. C. R., 414.
[8] Act XIV of 1859.

term had expired, would be compelled to restore possession to the lessee. The plain object is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the person who has taken the law into his own hands deriving any benefit from the process. It was intended to obviate the effect of the possible applications of English law to such cases. That law, as is laid down in *Harvey* v. *Bridges*,[1] is that the freeholder if entitled to eject the person in possession may commit an indictable offence in doing so, and yet gain all the advantages of a legal possession, and be perfectly secured against the action of the party assaulted. S. 15 is an application of the principle of the *interdictum unde vi*, and by it a possession lost otherwise than by due course of law is to be restored if the applicant makes his demand within six months." The *interdictum unde vi* of the Roman law, here alluded to, commences in these words "*unde tu illum vi dejecisti*[2] (whence you have ejected him, the plaintiff, by force). The object of it was to prevent the ejectment of any person from his occupation of immoveable property, although he was a mere possessor; and the writ was given to a man for recovering possession when he had been ejected by force from the possession of a farm or house. By the *interdictum unde vi*, to use the words of Justinian,[3] the ejector is compelled to restore possession even although the ejected had got possession from the former by force. In *Kawa Mdji*,[4] Prinsep, J. observed, "proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit."

In conclusion, I will again ask you to remember that the question of possession, whenever it arises, is a question mainly of fact. The marks of possession with regard to property depend on the nature of the property. It is not necessary, in order to prove possession, to prove an actual bodily and continuous possession. "The exercise of such acts of ownership over jungle lands," in the words of Peacock, C. J., "as would ordinarily be exercised over property of that nature would be evidence of possession."[5]

The fact of possession, however, not only gives rise to a possessory right, as we have just observed, but, under certain circumstances, becomes a source of title in itself, known as title by adverse possession, as we shall see further on.

[1] 14 Mees. and Welsby, 442.

[2] Gaius, 4, 154

[3] Institutes, 4, 15, 6.

[4] 5 C L. R., 278.

[5] Watson & Co. 3 W. R. (F. B.), 80.

LECTURE VI.

TITLE, OR CAUSE OF ACQUISITION.

The law gives the rights of property—Mitra Misra and Bentham—Respect for private property—Title, its etymology—Brahminic notion—Roman notion—Mussulman notion—*Asbáb ul milk*—Ortolan's explanation—*Pro Emptore* of the Roman law and *Krayádirupa* of the Brahminic—English definition of title—Abstract of title, meaning of—*Modus acquirendi* and *causa acquirendi*—Heineccius and Vinnius—Austin's explanation—Delivery of possession in transfer, its importance—Brahminic and Mussulman law—English and French notion—British-Indian Legislation—Investitive and Divestitive facts—Title by occupation—Title by succession—Title by operation of law and by act of parties—Transfer *inter vivos*—*Donatio mortis causâ*—Mussulman law—*Marz-ul-Maut*—Brahminic law—Absolute transfer and partial transfer—Title by accretion—Alluvion—Roman law—Brahminic law—English law—British-Indian law, Regulation XI of 1825—Lord Yarborough's case—*Felix Lopez* v. *Muddun Mohun Thacur*—Title by adverse possession—Brahmanic law—Roman law—Bentham's view—*Prescriptio* and *Usucapio*, meaning of—Ortolan's explanation—English Statutes of Limitation—Indian Law of Limitation—*Vigilantibus nec dormientibus jura subveniunt*—*Gunga Gobind Mundal* v. *The Collector of the Twenty-four Pergunnahs*—The modern acceptation of the term, prescription—*Poresh Narain Roy* v. *R. Watson & Co.*—Peacock C. J., his observation—*Bijoy Chunder Banerjee* v. *Kally Prosunno Mukerjee*—Markby J., his observation—Adverse possession, definition of—Possession never considered adverse if referable to a lawful title—*Thomas* v. *Thomas*—*Rains* v. *Buxton*—Reason of title by adverse possession—How the period varies in various countries—Adverse possession in course of formation, its legal character—Execution sale and private conveyance, their relation—*Raja Enayat Hossain* v. *Girdhari Lál.*

"The law gives the rights of property," proclaims the Brahmin Jurist,[1] and Bentham assures us that property is entirely the work of law.[2]

"A long time," observes Bentham, with the horrors of the French Revolution almost before his eyes, "has been necessary to carry property to the point where we now see it in civilized societies; but a fatal experience has shown with what facility it can be shaken, and how easily the savage instinct of plunder gets the better of the laws. Governments and the people are, in this respect, like tamed lions; let them but taste a drop of blood, and their native ferocity revives." However that may be, and whatever the merits of international morality between state and state or nation and nation, every government has, at least within its own municipal limits, been scrupulously regardful of the rights of property. "Every man's house is his castle," obtained from

[1] Ante, page 95, n. तदप्याह संग्रहकारः, Viramitrodaya, s. 17.

[2] Bentham's Theory of Legislation, 111.

Roman sources, is an old maxim of English law,[1] and the inviolable nature of the rights of property has been recognized on all hands. "If a Regulation," it was observed by their lordships of the Privy Council, "is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication."[2] The savage acquires and retains by the strength of his sinews, but it is the law alone that secures to each man the fruits of his labour. The question, therefore, which presses for consideration, is how do things around us in nature become the subjects of property, or how do certain things belong to one, or some, to the exclusion of all others. This will lead us to the investigation of the topic of title or cause of acquisition. The English word, title, (from *tueor*, *tutus*,) means literally that which protects,[3] and may be taken to designate all the complex facts, whether acts or events, upon which rights of ownership accrue.[4] A mere bodily contact with, or the mere possession of a thing, will not invest a person with ownership, or in other words, enable him to invoke the assistance of the law for protection against the interference on the part of everybody else. "One is not of course the owner of whatever is in one's hand," is the emphatic language of the Brahmanic law.[5] The Sanscrit word for title or cause of acquisition, as has been already remarked, is *ágama*. And Gautama thus enumerates the titles or causes of property:—"An owner is by inheritance, purchase, partition, seizure, finding, acceptance and conquest."[6] It is said that the existence of any of these causes (हेतु) indicates ownership, (स्वत्व), or ownership accrues when any of these causes happens. In Roman law, as one meets with in the Digest,[7] a series of separate titles is given under the description of *de acquirendâ vel amittendâ possessione* which purports to enumerate such events as are likely to produce a just cause of possession, namely, the semblance of purchase, of inheritance, of gift, of dower, of payment of a debt, of derelict, of legacy, and of occupation. For the word title, the classical Jurists are in the habit of employing the word, *causa*, which corresponds with the Sanskrit word, *hetu*. The word, "*titulus*," so far as I have been able to discover, occurs in one single passage of the whole Digest in the place of "*causa*," and appears to have been used by Ulpian.[8] In the Institutes of Justinian, the word, title, as expressive of *causa acquirendi* or cause of acquisition, does not appear at all, although English

[1] Semayne's case, 5, Rep 91, *cf. Nemo de domo suâ extrahi debet*, D. 50, 17, 103.

[2] *Lopez* v. *Muddun Mohun Thacur*, 5 B. L. R., (P. C.). See, also, the provisions of the Land Acquisition Act.

[3] Crabb's History of English Law.

[4] Amos on Jurisprudence, 172.

[5] Viramitrodaya, s. 16.

[6] रिक्थक्रयसंविभागपरिग्रहाधिगमेषु, Mitákshára, Viramitrodaya.

[7] Digest, *Liber Quadragesimus Primus*.

[8] D. 41, 8, 1.

writers are frequently found to use the word, *title*, in their translation of *causa*.[1] M. Ortolan, who, also, has sometimes translated "*justa causa*" into *juste titre* or just title, is, however, inclined to think that the word *titulus* as an equivalent of "*causa*" was of comparatively recent introduction.[2] The list of titles in Book 41 of the Digest, it should be noted, is referred to in connection with the subject of long possession with the purpose of showing that possession, however long, will not by itself produce ownership unless it should have had its origin in one of the aforesaid causes. For instance, although a seller cannot pass the ownership of what he has not the right to give, yet the buyer who has purchased a thing in good faith, or, as we should now say, a *boná fide* purchaser for value, may obtain by means of the semblance of a sale an absolute ownership over the thing by long possession, although without such a semblance of sale or cause, his long possession would be of no avail to him against the lawful owner.

The term "*justa causa*," which, as has been observed, is frequently used by English writers as an equivalent of title, seems to have been employed in Roman law to indicate not so much the cause of acquisition as the cause of lawful possession, for possession without one or other of the enumerated causes could never ripen into ownership or acquisition in the proper sense of the term. I am inclined to think that the word "*ágama*" in Brahmanic law was at all events originally used to convey precisely the same idea as the *justa causa* of the Roman law. Manu uses the word in connection with long possession, and *Kulluka*, we have seen before, explains the word as "the semblance, show or appearance of sale and the like"[3] or, as in Roman law, *pro emptore* and so forth. In later times, the word, "*ágama*," came to mean, also, "the probable or well-known causes of acquisition" (सम्भावितः प्राप्त्युपायः).[4] In Mussulman law, the corresponding expression for "title" is *asbáb-ul-milk*, or the conditions, circumstances, or causes of property. "The causes of property," in the words of the Hidáya, "as sale, gift and such as resemble these.[5] In English law, the word "title" is employed to denote the manner of acquiring and losing a thing.[6] It is also used in a technical sense, as in the expression, "abstract of title," which, in a transfer of sale or mortgage, means "an abstract of all deeds affecting the land, that may happen to be the subject of transfer for the last sixty years."[7]

[1] Sandar's Institutes of Justinian, Walker and Abdy's Justinian, Green's Roman Law.

[2] Ortolan, Institutes of Justinian, Vol. II, 366:—"*Justus titulus*," *cette expression paraisse plus récente.*

[3] Manu, c. 8, v. 300. Kulluka's gloss.—क्रयादिरूपस्त्वागमः.

[4] Mandlik's Vyávahára Mayukha, 11.

[5] Hidaya, Book xxi, c. 2 اسباب الملك من الشرى و الهبة و ما اشبه ذلك.

[6] 1 Stephen's Commentaries, 387.

[7] William's Real Property, Chapter on Title.

A distinction, however, seems to have been drawn between "the cause of acquisition" and "the mode of acquisition." The distinction, although founded on the principles of Roman law, is traceable more or less in all systems of jurisprudence. Heineccius warns us against confounding the *titulus* with the *modus acquirendi*. He says that between the two things there is a world of difference, inasmuch as a mere title to a thing cannot give us more than a right to a thing against a particular person or *jus in personam;* but in order to obtain a right to the thing against all the world or a *jus in rem*, it is necessary to superadd to the mere title the *modus acquirendi*.[1] An instance or two may be given to explain the meaning of Heineccius. A sells a certain house to B for valuable consideration. It afterwards turns out that A was not the owner of the house. Whatever rights B may have as against A, in respect of the house or in the shape of compensation, are in the nature of a *jus in personam* or *titulus ad acquirendum*, to use the words of Heineccius; but he cannot be said to have any right to the house as against all the world or a *jus in rem*. If, however, B were to hold pessession of the house under the simulated transfer for a period of time, he might at the end of the period obtain an exclusive right to the house against all the world including the lawful owner. Thus, it is evident that the *modus acquirendi*, here, is the continuous possession. Again, take another, and, perhaps, a better illustration: Gaius sells his horse to Titius; but, before delivery is given, Gaius sells the same horse to Sempronius who at once takes delivery. Here, Titius may have a right to the horse as against Gaius, or compensation in lieu of it, which is a *jus in personam;* but he has no right to the horse as against Sempronius, for until delivery is made or possession given, the buyer does not acquire a *jus in rem* or a right as against all the world in respect of the horse. The fact of sale is what Heineccius here calls a mere *titulus;* but the delivery is the mode of acquisition. The distinction, according to Heineccius himself, amounts to this, namely, that the *titulus* is the remote cause of acquisition, and the *modus acquirendi* the present cause (omne enim dominium duplicem habet causam; proximam, per quam immediate dominium consequor; et remotam, per quam et propter quam mediate fio dominus).

Heineccius concludes his observation with the remark, almost in the words of the Brahmanic lawyers, that it is a universal axiom of law that neither title without delivery of possession, nor delivery of possession without title is sufficient to pass the dominium.[2] Vinnius, another civilian of scarcely less distinction than Heineccius, very properly qualifies the axiom by referring to the classification of acquisition into original and derivative. The title to a thing, according to him, is the *right* to possess it. Now, in originial acquisition or the acquisition of a

[1] Austin's Jurisprudence, Vol. II, 997.

[2] *Ergo nec titulus sufficit sine traditione nec traditio sine titulo:—axioma regnans per universum jus.*

thing which formerly belonged to nobody, the *modus acquirendi* is identical with the *causa possidendi* or title. Thus, in acquisition by occupancy, the act of taking possession is not only the cause of acquisition; but also the mode of acquiring. It is otherwise with derivative possession or the acquisition of a thing which formerly belonged to another. In the latter, the title is the cause of the transfer or the intention with which the transfer is made, and the mode of acquiring is the delivery or other act equivalent in law to delivery. Thus, for instance, if the title to a thing is gift or sale or exchange or loan, these are the respective causes of possession of the thing transferred; but the *modus acquirendi* is the delivery of possession.[1] Where an unlimited right or *plenum dominium* is not transferred, the title or *causa possidendi* limits the mode of possessing; and the extent of the right of a possessor must always be judged and measured by the cause or title of his possession. Thus, the *modus acquirendi* gives effect to the title. Upon abstract principles, any manifestation of a transfer of right would have effect unless contrary to law; but the law of most countries has principally attached legal consequences to one particular outward act of transfer.

In Brahmanic law, a gift or other transfer is not complete so as to avail against all the world unless accompanied by some act of possession by the donee or transferee. "As in the case of land," in the words of the Mitakshara, "there can be no corporeal acceptance without any enjoyment of the produce, it must be accompanied by some little possession (भूक्तिः स्तोका) otherwise the gift, sale or other transfer is not complete."[2] It has, accordingly, been said in Lalubhai's case[3] that the mere title of a prior donee will not avail gainst a subsequent donee with possession. In *Dugai Debi* v. *Mathuranath*,[4] is was held that "a gift by a Hindu unaccompanied either by possession on the part of the donee or any symbolical act such as handing over documents of title, or permitting the donee to receive rents is not itself a valid transaction." In Mussulman law, a simple gift or *hibba* is of no avail without possession.[5]

In the old French law, "in order that an obligation," observes M. Rogron, "should transmit property, it should be followed by delivery; for instance, he who purchased a house became the proprietor only at the moment the house was delivered to him; if, however, the seller were wrongfully to sell the same house to another person and deliver possession to him, it was the latter who would have acquired the house. The obligation was thus only in title (*titre*) to enforce the transfer of the property; but the means of acquiring the property

[1] Bowyer, 95.
[2] Mitakshara, C. IV., s. 6, cl. 4.
[3] I. L. R., 2, Bom. 299.
[4] I. L. R., 9, Cal., 854.
[5] *Yusuf Ali* v. *Collector of Tippera*, I. L. R., 9, Cal. 138.

(*le moyen d' acquerir*) was the delivery.[1] The Code Civil, or the law which now obtains, has introduced a material change. In the case of immoveable things, the obligation to deliver the thing is completed by consent solely of the contracting parties, that is to say, it makes the obligee (*creáncier*) the proprietor, or, in other words, even if the delivery has not been made, the obligee can compel any detainer of the thing to give up possession. In the case of moveables, the law remains as before, and tradition is still necessary to transfer proprietary right or right *in rem*.[2]

Upon the principles of English law, in a transfer, (take the instance of sale and purchase), until a conveyance were actually executed as prescribed by law, the dominion or property will not be deemed to have passed so as to be complete in every direction. Thus, in a case where everything has been completed except the conveyance, a subsequent *bonâ fide* purchaser for value with a conveyance would have priority over the former purchaser. Here, the conveyance is understood to occupy the place of delivery of possession in the contemplation of the law. In *Shower* v. *Pilck*,[3] *Alderson, B.* was of opinion that to pass the property there must be both a gift and delivery. However, in *Martindale* v. *Booth*,[4] it was explained that "a gift of goods is good even without delivery, where there is a deed."

Coming to the British Indian Legislature, we find that the term title, is nowhere defined in any of the Acts. It occurs, however, incidentally in several sections of the Transfer of Property Act, where we are told, for instance, of "the documents of title."[5] So, in the Specific Relief Act, we read in s. 17, cl. *b*, "where the concurrence of other persons is necessary to validate the *title &c.*" Again, in cl. *d*, it is said, "where the vendor or lesser sues for specific performance, and the suit is dismissed on the ground of his imperfect title &c." Similarly, in the Registration Act we find the word "title" in juxtaposition with "right" and "interest." For instance, s. 17 of that Act, speaking of certain documents of which the Registration is compulsory, says: "Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any *right*, *title* or *interest* whether vested or contingent &c." In the Limitation Act, one meets with the expression, "acquisition of ownership by possession,"[6] and s. 28 of that Act speaks of the "extinguishment of the right to property" by reason of the continuous possession of another. In the Contract Act[7] we read, under the heading, "Title:"—"no seller can give to the

[1] Code Civil, exlpiqué, *par* J. A. Rogron. (Austin's Jurisprudence.)

[2] Code Civil, Articles 1138, and M. Rogron's notes. (Austin's Jurisprudence.)

[3] 4. Exch., 478.

[4] 3 B. & Ad. 506.

[5] The Transfer of Property Act, s. 55., clauses *b*, *c*, &c.

[6] S. 27.

[7] S. 108.

buyer of goods a better title to those goods than he has himself;" and then there is a number of exceptions enumerated. But, although there is no strict definition in any of the Acts of the word "title," we may safely accept the word *title* to be, as used by English writers, a brief and concise form of expressing those facts, acts, or events which in the contemplation of law are calculated to divest one person of the rights of property and invest another with those rights. "In proceeding to treat of the manner in which estates may be acquired and lost," observes Serjeant Stephen,[1] "it is obvious that we shall not have occasion to detach the consideration of loss from that of acquisition, but that they are reciprocal ideas; because, by whatever method one man gains an estate, by that same method, or its correlative, some other man has lost it." "Acquisition and loss," as employed in the passage, may very conveniently be expressed as INVESTITIVE FACTS and DIVESTITIVE FACTS.[2] We have already had occasion to point out that property, or the rights of property are the creature of law, and we should add that a court of justice will disregard any mode of acquisition or loss, or any investitive or divestitive fact, which the law does not recognize. For instance, a person under age is in law incompetent to enter into a contract, suppose such a person were to convey his property with all the requisite formalities of a transfer, such a transfer would at least be voidable, or in other words, the infant transferor upon his attaining majority would be entitled to rescind the transfer. In such a case, the law ignores the investitive or the divestitive facts. But it would be otherwise if the guardian of the infant were to convey away the property, such an act in the eye of the law would amount to a divestitive fact so far as the infant's interest in the property was concerned, and at the same time absolutely invest the transferee with the rights of property. We have to understand, therefore, that it is the law that lays down certain rules of investiture or divestiture. In dealing with the investitive or divestitive facts, one has to consider the rules laid down by law in regard to them. The Digest[3] explains the principles of acquisition under the heading of "*De Acquirendo Rerum Dominio*," or concerning the acquisition of proprietary rights, and informs us generally of the various rules according to which right to things may be acquired and lost. These rules are in the main recognized in the law of all advanced communities, and in considering this subject, it will be convenient in the first place to divide the topic of acquisition under two general heads, namely, original acquisition and derivative acquisition. Original acquisition consists of facts which although they invest a person with the rights of property in a thing, yet they do not at the same time divest any other person of any antece-

[1] Stephen's Commentaries, Vol. I., pp. 387 and 388.

[2] Bentham's Works, Vol. III., p. 189.

[3] D. 41, 1.

dent proprietary rights. This, it is apparent, is an ancient mode of acquisition; but the principle is still recognized, specially in the acquisition of wild animals, or animals *feræ naturæ*. "Sages conversant with the history of ancient times," observes Manu, "have declared that to him belongs the land who has been the first to clear away the jungle, and the beast belongs to him whose arrow has been the first to transfix it."[1] In Roman law, this form of acquisition is known as title by occupation, and Justinian treats it as a relict of ancient times (*vetustum jus*), when civil laws were just beginning to exist, when states were being formed and magistrates created.[2] Blackstone deals with this mode of acquisition under Occupancy, and principally confines himself to the acquisition of rights in animals *feræ naturæ*.[3] This mode of acquisition, it will readily be seen, proceeds upon the conception that the thing which is the object of it had originally no owner, but one has to bear in mind that in modern times everything in a country is supposed to vest in the crown or the state where there is no private owner.

The points which particularly concern us are the modes of derivative acquisition, or those cases in which the acquisition of a thing by one person presupposes a loss of the thing by another. The derivative modes of acquisition are generally treated of under two heads, namely, voluntary transfer and involuntary transfer. Voluntary transfer takes place when the former owner divests himself of his rights to a thing and invests another with those rights. For instance, when A by a deed of conveyance sells his land to B, A is said to divest himself of his rights to the land, and B is said to become invested with those rights; or, one may say, by the use of a metaphor, that A strips himself of his legal mantle in respect of the land, and throws it on B's shoulders, and, thereafter, B is happy to attire himself with it.

Involuntary transfer occurs where one person acquires a thing either against the will or without the consent of the former owner. For instance, where a man is declared an insolvent on the application of his creditor, his whole property is thereupon taken away from him and vested in an officer of the Court. Or, where in execution of a decree the debtor's property is sold by auction, the auction purchaser, thereupon, becomes the proprietor in place of the former owner.

Again, when a person dies leaving a large property, his death is an external event which divests him of his proprietary rights, and, thereupon, his heirs become vested with them. There is also the case where a person commits some heinous offence, wherefore the law divests him of all his proprietary rights and invests the State with those rights. Under the Penal Code,[4] where a person is con-

[1] Manu C. 9, V. 44.

[2] Justinian, Institutes Lib. II., Tit. 1, s. 11.

[3] Stephen's Commentaries, Vol. 2, p 16.

[4] S. 61.

victed of some serious offence, he will not only lose all his proprietary rights, but "shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned." It will be seen that in every one of these cases, whether in the event of insolvency, of execution of a decree, of the death of the original proprietor, or the commission of some heinous offence on the part of the original proprietor, the will or consent of the original proprietor forms no element of the divestitive facts, and English lawyers have been in the habit of denominating such transfers as transfers by "act of law." In some of the cases, namely, in the case of insolvency, of auction purchase, and in that of the offender, the title of the official assignee, the title of the auction purchaser, and the title of the state may be placed under the general head of title by adjudication, or the order of a court of justice. The last case, namely, the case in which an offender is divested of all his proprietary rights, has received a special name, and the title of the state has been described as title by forfeiture. The case of inheritance which arises from the death of the original proprietor is founded purely upon the rules of law, and has been described as title by "succession."

Besides these modes of divestiture which are known as involuntary, there are other modes in which a person willingly divests himself of his proprietary rights and invests another with those rights. These modes or rules, as has been already observed, are conveniently classed under voluntary transfer. For instance, a person may transfer his rights to another during his lifetime, or in the event of his death. In the former case, the transfer is said to be one *inter vivos*, or simply alienation or conveyance; in the latter, the transfer is said to be a a transfer on death or testamentary transfer. English lawyers are in the habit of describing such transfers as transfer by deed and transfer by will respectively. It is worthy of note that there is a particular kind of transfer which is neither a transfer *inter vivos* nor a testamentary transfer, although it may be said to partake of the nature of each. Such a transfer is known as *donatio mortis causâ*, or gift in contemplation of death. It is confined, in English law, to personal property, whether in possession or in action.[1] In *Duffeld* v. *Elwes*,[2] it was said that the delivery of the mortgage deeds of real estate will constitute a valid *donatio mortis causâ*. Under the Indian Succession Act,[3] however, "a man may dispose, by gift made in contemplation of death, of any immoveable property which he could dispose of by will." Immediate delivery is essential to such a gift, but where the property does not admit of actual delivery, a delivery of the means of coming at the possession or making use of the thing given will be sufficient.[4]

[1] Stephen's Commentaries, Vol. II, 48.

[2] 1 Bligh N. S. 497.

[3] S. 178.

[4] Williams on Executors, 691.

The gift is liable to be revoked at any time before the death af the donor.[1] Neither in the Brahmanic nor the Mussalman law is there a *donatio mortis causâ* in the sense of the English lawyers. There is, however, some remote analogy between this English form of donation and a gift made in what is called "death-illness" (Marz ul máut) in the Mussalman law. A gift made in death-illness is not confined to moveable property alone, and is restricted in its extent to one-third of the donor's property.[2] It should be observed, that in the Roman law, of which the English law of gift *causâ mortis* is substantially a copy, there does not seem to be any distinction made in respect of the material subject of the gift or as to the quantity of the gift. Such gift might extend to all kinds of property, whether moveable or immoveable, and embrace the whole estate.[3]

Transfers *inter vivos* take place in respect of moveable as well as immoveable property, and may in their nature be absolute or partial. Sale, gift, and exchange are the usual instances of absolute transfer, whereas mortgage, charge and lease are said to afford illustrations of partial transfer. In sale, for example, a person is considered to divest himself of all the rights of ownership which he may happen to possess in favour of the purchaser; whereas in the case of a mortgage, the mortgagor divests himself of his rights of ownership *sub modo*, and, as was observed before, both the mortgagor and the mortgagee are owners in a special or limited sense. We shall, hereafter, endeavour to investigate the characteristic incidents of this class of transfers, and how they differ the one from the other. At present, it will be sufficient to note that it is a distinctive feature of these transfers that they are founded on contract. In other words, the mutual consent of the parties is essential to the validity of such transfers.

There now remain for consideration two classes of title which are of a somewhat special character, such as "title by accretion" and "title by adverse possession." Title by accretion falls under the more comprehensive term, *accessio*, of the Roman law, which deals with the acquisition of rights, (i) over things which are added by the forces of nature to, and become an inseparable part of, another thing regarded as the principal thing, and (ii) over things which by the operation of man are united with other things so as to form one indivisible whole.[4] Title by accretion is the appropriate subject of the first branch. An instance or two will suffice to illustrate the second branch of the division: where a man builds on his ground with materials that belong to another, he is understood to be the owner of the building; because all that is built on the soil yields to the soil *(quia omne*

[1] *Jones* v. *Selby*, Prec. Ch. 300.

[2] *Muhammad Gulshere Khan* v. *Mariam Begum*, I. L. R. 3 All. 731. See, on the point of Hindu" law, *Kumar Upendra Krishna Deb* v. *Nobin Krishna Bose*, 3 B. L. R. (O. C.) 113.

[3] Digest XXXIX.

[4] Sandar's Institutes of Justinian. Introduction, xlix.

quod inædificatur solo cedit).[1] Suppose, one were to build with one's own materials for the owner of the soil, as soon as the stones are fixed with mortar they cease to belong to the builder, and become part of the owner's land.[2]

We shall next proceed to consider the subject of the first branch. Land, it is said, unlike air or flowing water, is not a wandering thing, and is by its nature demarcatable and divisible; but to this there seems to be an exception. A mainland, for instance, may gradually be washed away and in time deposited on another's land, or it may suddenly be torn away and attached to a neighbour's soil. The former is known as the process of alluvio and diluvio, the latter as the process of avulsio. "Whatever," in the words of Justinian, "a river adds to your estate by alluvion, becomes yours by natural law."[3] Alluvion is defined to be an imperceptible increase *(incrementum latens)*, and a thing is acquired by alluvion when it is added in such small quantities *(ita paulatim)* that one can hardly perceive how much is added at any one moment of time *(quantum quoquo momento temporis adjiciatur)*.[4] If, however, the violence of a river should drag away a portion of your land, and carry it on to the land of your neighbour, it still continues to be yours.[5] It appears from the writings of Roman jurists, although far from being clear,[6] that the bed of a river as long as water flows over it, or at all events the use of the bed, belongs to the public; but when the bed is dried up, the riparian proprietors, on either side of the bank, become the owners of the bed in proportion to the quantity of each one's estate on either side *(pro modo latitudinis cujusque fundi)*.[7] When an island is formed in the middle of a river, it belongs in common to the proprietors on either side of the river; but if the island is nearer to one bank than the other, it belongs to him who possesses the land on the nearer side. Again, if a river divides itself and afterwards unites again, thus giving the land of one the form of an island, the land continues to be the land of the owner as before.[8] In the case of inundation, the submerged land reverts to the owner the instant it is dry, or, in fact, the land, though under a flood, never changes hands at all.[9] In Brahmanic law, the words of Brihaspati are to this effect:—"The land left by a river is

[1] Justinian's Institutes, Lib. II, Tit. 1, s. 29.

[2] D. 6, 1, 39.

[3] J. Lib. II, Tit. 1, s. 20.

[4] *Ibid.*

[5] J. Lib. II, Tit. 1, s. 21.

[6] Note the observation of Labeo, "*insula quæ in flumine publico nata est, publica esse debet*," and a public river is defined by Cassius and Celsus to be that which is perennial (perenne). D. 41, 1, 65 s. 4 and D. 43, 12, 3.

[7] D. LXI, 1, 30, 1.

[8] *Ibid.*

[9] Justinian. Lib. II, Tit. 1, s. 24.

acquired by those who reside on either side of the banks. A river frequently increases on one side and decreases on the other; the land forsaken by a river owing to its taking a different course falls to the share of him who is the owner of the land adjacent to the bank. When a land is divided into two or more parts by the violent course of a river, it shall belong to the former owner."[1]

In the French Code, the accumulation and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream is denominated, alluvion. Alluvion is said to be for the benefit of the proprietor of the shore whether in respect of a river, navigable stream, or one admitting floats or not, on condition in the first case of having a landing-place or towing path. It is the same with regard to derelictions occasioned by a running stream retiring insensibly from one of its banks, and encroaching on the other, the proprietor of the bank on which the alluvion takes place derives benefit therefrom without giving the proprietor on the opposite side a right to reclaim the land which he has lost. If a river or a stream, navigable or not, carries away with a sudden violence a considerable or distinguishable part of a field on its bank, and bears it to a field lower down on its opposite bank, the owner of the part carried away may recover the property. In respect of islands, the French law substantially follows the Roman.[2]

The English law on the subject of alluvion is substantially the same as the Roman law,[3] which Bracton seems to have copied bodily from the Institutes with the change or transfer of a word or phrase here and there.[4] In *The King* v. *Lord Yarborough*,[5] "an inquisition found that a piece of land had in times past been covered with the water of the sea, but was then, and had been, for several years past, by the sea, left, and the Commissioners caused the same to be seised into the king's hands. The defendant filed a traverse, stating that he was seised in fee of a certain manor and the demesne lands thereof, and that the same piece of land, mentioned in the inquisition, by the *slow*, *gradual* and *imperceptible* projection, alluvion, subsidence, and accretion of ooze, soil and sand and other matter, being slowly, gradually and by imperceptible increase, in long time cast up, deposited and settled by and from the

[1] Prosonno Cumar Tagore's Viváda Chintámani of Váchaspati Misra, 123.

[2] Code Civil, Articles, 556—561.

[3] Stephen's Com., Vol. I, 457 and 458.

[4] Compare the language of the Institutes with Bracton's conception of alluvion: Justinian's Institutes, Lib. II, Tit. 1, s. 20 runs thus, "*alluvio incrementum latens; per alluvionem autem id videtur adjici, quod ita paulation adjicitur ut intelligere non possis quantum quoque momento temporis adjiciatur.*" Bracton thus defines alluvion:—"*latens incrementum quod ita paulatim adjicitur ut intelligere non possis quo-momento temporis adjiciatur.*"

[5] 3 B. and C. 91.

flux and reflux of the tide upon and against the extremity of the said manor, hath been formed and thereby become parcel of the demesne lands of the manor." It appeared from the evidence that the land in question had been formed gradually by ooze and soil deposited by the sea, and the increase could not be observed when actually going on, although a visible increase took place every year, and in the course of fifty years a large piece of land had been thus formed. Abbot, C. J. held upon the evidence that the accretion having been formed by the slow, gradual and imperceptible projection of ooze, soil and sand had become a part of the defendant's land. In the Matter of The Hull and Selby Railway,[1] a similar doctrine was laid down in the case of tidal and navigable rivers.

The British Indian law on the subject is laid down in Regulation XI of 1825. This law was passed about a year after the decision in Lord Yarborough's case. The Regulation speaks of the immemorial usage of *shikast* and *paiwast* or disjunction and conjunction, and almost reproduces the language of the Roman law. It distinctly lays down that land annexed by alluvion to another land partakes exactly of the legal incidents of the latter, and if such land accrues to the land of a tenant, it will enable the landlord to increase the rent thereof.[2] A distinction, also, seems to have been clearly drawn between large navigable rivers and small shallow rivers, and it may be observed that that distinction does not appear in Blackstone. The bed of a large navigable river is not accounted to be the property of an individual, and if a chur or island be thrown up in such a river, it will be at the disposal of Government; but if the channel between the island and the shore be fordable at any season of the year, it shall belong to the person or persons whose estate or estates may be most contiguous to it. In small and shallow rivers, in accordance with the suggestion of Blackstone, the beds of which with the julkur right of fishing, or "soil and piscary" in the words of the English commentator, may have been recognized as the property of individuals, the chur or island will belong to the proprietor of the bed.[3] In *Felix Lopez* v. *Muddun Mohun Thacoor*,[4] their Lordships of the Privy Council observed that it was a principle not merely of English law, or peculiar to any system of municipal law, but a principle founded in universal law and justice that, "whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes of a volcano, or a field covered by the sea or a river,

[1] 5 Mees and W. 327. Lord Abinger, C. B. :—"The principle there (in Lord Yarborough's case) established is not peculiar to this country; but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection or adjustment of property.

[2] S. 4 with proviso.

[3] Regulation XI of 1825, s. 4, Clauses 3 and 4.

[4] 13 M. I. A. 467.

the ground, the site or the property remains in the original owner. There is, however, another principle recognized in the English law, derived from the Civil law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, then from the supposed necessity of the case, and the difficulty of having to determine year by year to whom an inch or a foot or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land."

In *Eckowrie Singh* v. *Heera Lal Seal*, Lord Chelmsford is reported to have said that "land which had been removed by sudden avulsion belongs to the owner although attached on to the land of another; the title by accretion to a new formation of alluvial land is founded on a gradual accretion by an adherence to some particular land, the land so gained following the title of that to which it adheres."[1] It is worthy of note that, in *Lopez* v. *Muddunmohan Thacoor*, their Lordships appear to be of opinion that gain by alluvion under the Regulation is gain from the public, or, in other words, the investitive fact of acquisition is accompanied by a correlative divestitive fact in respect of the public or the state. "In truth," it was said in that case, "when the whole words are looked at, not merely of Clause I of section 4, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with is the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not useable in the ordinary sense, that is to say, the sea belonging to the state, the public river belonging to the state."

It will be easily perceived that although there may be, upon the supposition of their Lordships of the Judicial Committee, the presence of divestitive facts in the mode of acquisition by accretion, there is an entire absence of the contractual element, and even if it be said to resemble the case of acquisition by occupation, the occupation here, it is apparent, is of an entirely unique character; for it takes effect, in the expressive words of M. Ortolan, not by the will of the persons, but without their knowledge and even against their will; it rather operates by the instrumentality of the thing itself which is the object of accretion.[2]

We will next proceed to consider the title by adverse possession. In Brahmanic law, no length of possession or enjoyment, even if it were for hundreds of years, would convert the possessor into an owner without some semblance of title. "On the unlawful possessor, or a possessor without a just cause, the king should inflict the punishment due to a thief," is the sentence of

[1] 12 M. I. A. 136.

[2] Ortolan's Roman Law, Vol 2, p. 269 —"*Occupation d'une nature toute particulière, car elle s'opère, non par la volonté des personnes, mais à leur insu, même contre leur gré, par la chose même*"

Nárada.[1] The same Rishi observes that no possession will ever furnish any evidence of title unless it be a pure *(sudha)*, or *bonâ fide* possession.[2]

We have already seen that, according to Yajnávalkya, a *bonâ fide* possession for twenty years in the case of land, and ten years of such possession in the case of other property, provided the possession takes place in the presence of the owner, causes the destruction of proprietary right; but upon the construction of the passage by Vijnaneswara, possession even if *bonâ fide* cannot do more than destroy the rights of the owner to, as we should now say, the mesne profits. And, in the words of Nárada, in respect of a deposit, a mortgage, the property of an infant, there can never be a *bonâ fide* possession, such as would produce a title.[3] Compare with these aphorisms the indignant language with which Bentham denounces the theory of title by possession without good faith:—"I suppose that the possession is in good faith, that is, that the possessor believes himself to have a title. If not so, to confirm it would not be to favour security, but to reward crime. The age of Nestor ought not to be sufficient to insure to the fraudulent usurper the wages and the pay of his iniquity. Why should there be a time when the malefactor can become tranquil? Why should he enjoy the fruits of his offence under the protection of the laws he had violated?"[4]

In Roman law, as has been already noticed, no length of possession without a just cause and unless *bonâ fide* will create a title. "It is to be observed," says Justinian, "that a thing must be tainted with no vice, that a *bonâ fide* purchaser, or person who possesses from any other just cause, may acquire it by long possession."[5] The terms, which, in Roman law, are indicative of acquisition by long possession, are found to be *usucapio* and *præscriptio*. The term, *usucapio*, was originally confined to the acquisition of right or title to a *res mancipi* after the enjoyment of it for a specified period of time. Where, for instance, a *res mancipi* was transferred without the rigorous formalities of the law, the transferee could, after the enjoyment for one year, if the thing was moveable, and after the enjoyment for two years, if the thing was immoveable, acquire an indefeasible title to the thing. It should be remembered that for a long time there was an important distinction observed in Roman law between Italian land and Provincial land. *Usucapio* affected all moveables wheresoever situated; but with regard to immove-

[1] अनागमं तु योभुंक्ते वहून्यब्द शतान्यपि। चौरदण्डेन तं पापं दण्डयेत् पृथिवीपतिः। Mitakashara, Vyávahára Mayukha.

[2] आगमेन विशुद्धेन भोगोयाति प्रमाणतां। अविशुद्धागमो भोगः प्रामाण्यं नैवगच्छति॥ Vyávahára Mayukha.

[3] नोपभोगेन नश्यति, Nárada, Vyávahára Mayukha.

[4] Bentham's Theory of Legislation 160.

[5] Lib. II, Tit. 6, s. 10.

ables, its operation was confined to such immoveables as were in Italy. Thus, *præscriptio* was the only mode of acquiring, although, as will appear immediately, by indirect means, title by long possession in respect of immoveable things in the Provinces. This *præscriptio* was nothing more than a plea in bar or a plea of limitation. The etymology of the name is of considerable significance. The name is derived from *pre* = before, and *scribere* = to write. It was a well-known practice among the Roman prætors or judges to send a writ or formula to the judex, or assessor, in order that the latter should investigate the points in issue. Now, in a case where the plaintiff sued for possession or in ejectment, and the defendant's plea happened to be one of long possession, all that the prætor did was to write on the top of the writ or formula, the plea of long possession, the effect of which was to limit, at least in the first instance, the field of investigation of the judex. And the plea, if successful, had the direct or immediate effect of barring the remedy of the true owner rather than to extinguish his title.[1] Whereas, in *usucapio*, the immediate result was the perfecting of the title of the transferee, hitherto regarded as a mere possessor. Justinian extended the law of usucapaio to every country in the Empire, and land in the Provinces as in the *solum Italicum* was brought under the same rule. The term *præscriptio*, it should be observed, does not appear in the Institutes, although Mr. Sandars, in his valuable treatise on the Institutes of Justinian, employs in his translation the word prescription in the place of the original "usus."[2] Under the old Civil Law,[3] it was provided that if any one by purchase, gift or any other just cause had *bonâ fide* received a thing from a person who was not the owner, but whom he thought to be so, he should acquire the thing by use (*usucapio*) if he held it for one year, if it were a moveable, wherever it might be; or for two years, if it were an immoveable, but this only if it were in Italian soil (*solum Italicum*). Justinian altered this ancient law by extending the time in the case of moveables to three years, and in the case of immoveables, whether in Italy or in the Provinces, to ten years when the owner was present, and twenty when the owner was absent. The reason which Justinian assigns for the rule is the prevention of the ownership of things remaining in uncertainty; but it appeared to him that the periods prescribed by the ancients were insufficient for owners to search for their property.

It has been already observed that it is at least doubtful whether there is

[1] Ortolan, Explication Historique des Instituts, Vol. II, p. 360, n. 1:—On nommait prescriptions (de præ scribere) certains restrictions, mises au commencement de la formule addressée au juje par le préteur. Ces restrictions étaient mises à la requête, soit du demandeur, soit du defendeur, &c.

[2] J. Lib. IV, Tit. 6, s. 5:—"*Ut dicat possessorem usu non cepisse.*" Mr. Sandars translates the passage thus:—"he may allege that the possessor has not acquired by prescription."

[3] Justinian's Institutes Lib. II, Tit. 6.

such a thing as title by adverse possession in Mussulman law. It appears, however, from the Raddul Mukhtar,[1] that a certain Sultan had enacted in Constantinople that a suit was not maintainable after fifteen years except with regard to trust property or inheritance.

In English law, there are two Statutes which deal with the subject of acquisition of right by means of long possession. One is 2 and 3 Will. IV, c. 71, and the other is 37 and 38 Vict. c. 57. The former relates to the acquisition of certain easements, such as the right to enjoy the use of light to, and for, any dwelling-house. It is called the "Prescription Act," and the object of it is explained to be the shortening of the time of prescription in certain cases. It is there said that when the access and use of light to, and for any dwelling-house, shall have been actually enjoyed thereunto for the full period of twenty years, the right thereto shall be deemed absolute and indefeasible. The Statute 37 and 38 Vict. c. 57 is known as the Limitation Act, and the object of it is to reduce the period during which a person was allowed to bring his suit to establish his right to certain things under 3 and 4 Will. IV, c. 27, that is, from twenty to twelve years.

In the British Indian Legislature, a possession for a period of twelve years has always been regarded as destructive of the remedy of the excluded owner in respect of immoveable property. A useless fiction, however, was introduced to the effect, that although the remedy was taken away, the right or title was not extinguished, giving rise to a juridical misnomer, that a right not enforceable by law may yet be a right, and which was wholly inconsistent with the maxim *ubi jus ibi remedium* (where there is a right there is a remedy). It was not until the year 1867 that their Lordships of the Privy Council clearly expressed the law in *Gunga Govind Mundul* v. *The Collector of the Twenty-four Pergunnas.*[2] "The title to sue for dispossession of the lands," it was there said, "belongs to the owner whose property is encroached upon; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession." In pursuance of this opinion, a clause was for the first time added in the Limitation Act of 1871 which has since been continued in the present Act. Here is the last section of that Act[3]:—"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It should be observed that under the Indian Act a period of twenty years' enjoyment is necessary to give a right of easement, or, in the language of the English statute, a prescriptive right.[4]

[1] Page 531.
[2] 11 M. I. A. 361.
[3] The Limitation Act XV of 1877, s. 28.
[4] S. 26.

In the English Statutes, it will be observed, the term "prescription" is applied to the acquisition of rights commonly known as easements; whereas the term "limitation" is applied to the acquisition of rights to other properties. In the Indian Limitation Act, the term "prescription" has altogether been dropped; but whereas the acquisition of a right of easement is called an acquisition, the acquisition of title to any other kind of property by length of possession has been negatively spoken of as an extinguishment of the right to property.[1]

It is essential to notice a marked distinction between the Brahmanic and Roman law on the one hand, and the English and British-Indian law on the other, in respect of acquisition of title by length of possession. Under the former systems of law, in no case, as has been already observed, could an unjust possession, no matter how long soever the period, give rise to an indefeasible title; whereas under the latter the principle of *vigilantibus non dormientibis jura subveniunt* (the law helps the watchful and not the sleepy) is rigidly enforced, and with the partial exception in the case of express or implied fraud, the injustice of the possession, in the sense of the Brahmanic or the Roman jurists, presents no obstacle to the acquisition of a title. In *Kower Poresh Narain Roy* v. *R. Watson and Co.*,[2] Peacock, C. J., thus observes:—"Speaking of possession and prescription, the Civil law says,—"to acquire prescription it is necessary to have possessed honestly and fairly, that is that the possessor must have been persuaded that he had a just cause of possession, and must be ignorant that what he possessed did belong to another person, and this integrity is presumed in every possessor, if it is not proved that he has possessed with bad conscience, knowing the thing to be another's." I do not mean to say that the fact of taking possession dishonestly or knavishly will prevent a man from availing himself of an express law of limitation. The law of limitation in this country being express, dishonesty in obtaining possession will not prevent the possessor from availing himself of the provision of that law; but the law cannot relieve him from the charge of dishonesty, and as to the point of conscience it is most certain that the length of time does not secure unjust possessors from the guilt of sin, and that on the contrary their long possession is only a continuation of their injustice." This is strong language, and Markby, J., has made similar observation in *Bejoy Chandra Banerjee* v. *Kally Prosunno Mukerjee*.[3] There, one Kali Prosunno Mukerjee left his home in 1847 leaving behind him his wife Bhobotarini, then a child of the age of 9 or 10 years, and certain landed property. When Bhobotarini reached the age of 15 or 16, she formed an intimacy with Bijoy Chandra

[1] See, marginal notes to s. 26 and s. 28.

[2] 5 W. R., 283, 284.

[3] I. L. R., 4 Cal., 327.

Banerjee. In 1855, she, having previously taken possession of all her husband's property, gave a lease to Bejoy in perpetuity of thirty-seven bighas of land reserving an annual rent of Rs. 22. The deed described Bhobotarini as the widow of Kali Prosunno Mukerjee. Bejoy Chandra remained in possession until 1872, when Kali Prosunno returned and ousted him. It was *held*:—that the position of the grantee was not that of a lessee, and that his psssession (although an act of trespass against the husband), having continued for upwards of twelve years, had perfected his title to the lands. Markby. J. said, "Considering the discreditable circumstances under which the plaintiff came into possession, I feel considerable reluctance in giving him the benefit of the Statute of Limitation; but the Legislature in this country has not thought fit in laying down its rules of prescription and limitation to make any distinction between cases where the possession begins by wrong, and cases where the possession commences in a *just cause*, although it may be under a defective title. And though I consider that distinction to be a sound one, and though it is recognised by the Hindu Law,[1] I do not think it is within the province of courts of justice to qualify the express and deliberate enactments of the Legislature.

It may be worth while to consider the principle laid down by the English courts of justice that a possession is never considered adverse if it can be referred to a lawful title. In *Thomas* v. *Thomas*,[2] a father, who had several children entitled to estates on the death of the mother, all the children being under age at the time, entered upon the estates and retained the properties after the children had attained the ages of twenty-one years. There it was contended that though the entry of the father might have been lawful in its inception, the retention of the properties after the children attained their years of discretion barred their right under the Statute of Limitation. "I think," Lord Hatherly is reported to have said, "the better and sounder view here is that if the father entered as guardian, this Court would never allow him to set up any other title to the estate; however, if it were set up he would be in a different position as to the statute from a stranger who had so entered. Then assuming that he ceased to continue in the position which up to that time he had held as a father receiving rent for his children, still the rights of the children would accrue for the first time when they respectively attained the age of twenty-one." This principle was recognized by Fry, J., in *Rains* v. *Buxton*:[3]—"In my view, the difference between dispossession and the discontinuance of possession might be expressed in this way—the one is when a person comes in and drives out the other from possession, the other case is where the person in possession goes out and is followed into possession by

[1] Mitakshara c. iii., s. 3.

[2] 2 Kay and Johnson, 84.

[3] 14 L. R., Ch. D., 537.

another person, but there is another principle that possession is never considered adverse if it can be referred to a lawful title." An important authority on this point is *Milner* v. *Bright*,[1] where a party who had taken possession of copyholds on the death of his wife by an adverse title, lived more than twenty years afterwards. It was there found that there was an old custom of the Manor by which he had a right to Curtesy. And therefore his possession was referred to that title, which was consistent with the title of the other party." It was said in *Govind Lall Seal* v. *Debendra Nath Mullick*,[2] there was no adverse title while a tenancy contiuued.[3] In Haradhan Roy,[4] it was said to be a general rule of law that in a suit between a landlord and a tenant, there could be no limitation or adverse possession so long as the tenancy continued.

The term "adverse possession" does not appear to have been defined in any of the Indian Acts. Markby, J. thus explains the term :[5]—"By adverse possession, I understand to be meant possession by a person holding the land on his own behalf, of some person other than the true owner, the true owner having a right to immediate possession."

Neverthless, both the English and Indian laws are equally assertive on the denunciation of fraud. The Indian Limitation Act, following closely on the language of the English Statute, lays down that when any person having a right to institute a suit or make an application has by means of fraud been kept from the knowledge of such right and of the title on which it is founded, the time limited for instituting a suit or making an application shall be computed from the time when the fraud first became known to the person injuriously affected thereby.[6] Nor will that law allow a trustee to gain a title by any length of possession, as against his *cestui que* trnst. It was observed in *Smith* v. *Lloyd*,[7] that there can be no discontinuance of possession, or the giving up of possession by the real owner and the taking of possission by some one else when the wrongful possession is taken secretly. The case of *Vane* v. *Vane*[8] is strongly illustrative of the anxiety of the law to relieve against fraud though coupled with long possession. There the plaintiff stated that his father Frederick Vane had cohabited with his mother before their marriage, and upon her being with child he determined to marry her before the birth of such child. Before, however, the marriage could be celebrated she was con-

[1] 10 East, 583.

[2] I. L. R., 6 Cal, 611.

[3] Parbutti Dasi, I. L. R., 3 Cal., 576.

[4] 24 W. R.

[5] *Bejoy Chandra Banerjee* v. *Kali Prosunno Mukerjee*, I. L. R., 4 Cal., 327.

[6] The Limitation Act, s. 18.

[7] 9 Exch, 562.

[8] L. R., 8 Ch., App. 395.

fined The marriage took place some short time afterwards, and it was then agreed between the husband and the wife, in order to prevent the child suffering from the untoward accident of its premature birth, to falsify the date of such birth and represent it as having taken place after the marriage. This was done, and that child was accordingly produced, represented, and treated as being the legitimate son, the eldest son, and the heir in tail of the settled property. Some years afterwards the plaintiff himself was born, and was the real eldest son and heir in tail, but brought up as if he was only a younger child and kept in ignorance of the real facts as to his position and right. When the supposititious child attained his majority he was informed of the fact that he was illegitimate, and with this knowledge the father and himself went through the form of a common recovery in the character of tenant for life and tenant in tail in remainder to such uses as they should jointly appoint. A joint appointment was made, and afterwards under a marriage settlement the property was expressed to be limited to uses in favour of the defendants, the widow and the eldest son of the suppositious heir. It was also averred that the fact that the first child was illegitimate was well known to the father of his widow for some time before the marriage, and he negotiated the terms of the said settlement as the agent and in behalf of his daughter. Upon this state of facts the Court observed :—" If the supposititious son himself were now alive it would be impossible for him effectually to contend that this Court would allow him to avail himself of the legal bar arising from the length of his fraudulent possession. And this Court will wrest property fraudulently acquired, not only from the perpetrators of the fraud but, to use Lord Cottenham's language, from his children and his children's children, or from any person, amongst whom he may have parcelled out the fruits of his fraud." It must be observed, however, that, under the Indian law, a *bonâ fide* purchaser for value from a perfidious trustee is enabled to acquire a title against all the world after twelve years' adverse possession.[1]

It will be readily seen that the title by adverse possession does not arise from contract. There is the absence of mutual consent, unless the discontinuance of possession by the true owner, or the suffering of dispossession by him for some time may, by a stretch of language, be attributed to a sort of *quasi*-consent or acquiescence. The principle upon which the theory of gaining title by adverse possession seems to have been based is that what has been already alluded to in the writings of Justinian, namely, to give security to title and to quiet possession. The reason has been thus expressed by Bentham :—" Possession after a certain period fixed by the law, ought to prevail over all other titles. If you have suffered that period to elapse without puttiug in a claim, it is a

[1] The Limitation Act, Second Sehidule Article, 134.

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[1] The Limitation Act, Second Sehidule Article, 134.

proof, either that you were ignorant of the existence of your right, or that you had no intention to avail yourself of it. In these two cases, there is no expectation on your part, no desire to gain possession; and on my part there is an expectation and a desire to preserve it. To leave the possession in me will not be contracy to security; but it will be an attack upon security to transfer the possession to you, for it will give inquietude to all possessors who are obliged to rely for their ancient possession in good faith. But what length of time is necessary to produce this displacement of expectation? Or, in other words, what period is necessary to legitimate property in the hands of the possessor, and to extinguish every opposite title? To this inquiry no exact answer can be given. It is necessary to draw at hazard the time of demarcation, according to the kind and value of the property in question."[1] And thus different countries have laid down different periods of limitation, and even in the same country the period has varied from time to time.[2] In Rome, we have seen the period of enjoyment after which the title was considered to be perfected was raised in the time of Justinian. In England it has been reduced in certain cases. In Norway, such period is stated to be twenty years, whether the property be moveable or immoveable. In Louisiana, the prescription of twenty years is laid down for immoveables. In Denmark, the period is considered to run against minors; whereas, under both the English and British Indian laws, minority or other disability intercepts the period of limitation.

It remains to add that an adverse possession, although it has not yet ripened into an indefeasible title, may form the subject of a transfer, and the possession of the transferrer and that of the transferee together may be regarded as completing the period of twelve years. This may perhaps be opposed to the doctrine of the Roman law of *usurpatio*,[3] or the interruption of possession; but it was so laid down in *Brindaban Charan Roy* v. *Tarachand Bandyopadhyay*.[4] Markby, J., there, observed:—"I think it cannot be disputed that by the possessor is meant not only the person in original possession, but any person who comes in under him during the twelve years, by inheritance, will, or conveyance." It was also pointed out in that case, relying on the dictum of their Lordships of the Judicial Committee in *Raja Enayet Hossain* v. *Girdhari Lall*,[5] that there was no distinction to be made in favour of a person claiming under an execution sale as contra-distinguished from the representative of any person claiming under an ordinary assignment and conveyance.

[1] Bentham's Theory of Legislation, 159, 160.

[2] Les Codes Civils étrangers, Par Saint-Joseph. Introduction, XCIV XCV, XCNI

[3] Dig. 41. See, also, Sandar's Justinian, 144 notes.

[4] 11 B. L. R., 238.

[5] 2 B. L. R. (P. C.), 78.

LECTURE VII.

GROUNDS OF INCAPACITY.

Possession of land, its importance—Foreigners, their position in Rome—Disability of foreigners—*Droit d'aubaine*—7 and 8 Vict. c. 66, its effect—33 Vict. c. 14, s. 2—The British Indian Legislature, Regulation XXXVIII of 1793—The change in favour of European British Subjects—Precarious position of foreign Europeans and other foreigners in British India—Act III of 1864—Disability arising from offence—Attainder under the English law, its effects—Forfeiture for treason and felony abolished by 33 and 34 Vict. c. 23—The Law of forfeiture under the British Indian law—Disqualification arising from Insolvency or Bankruptcy—Relation between Creditor and Debtor—Roman law—Brahmanic law—Mussalman law—British Indian law, 11 and 12 Vict. c. 21 and The Code of Civil Procedure—Weakness or imbecility of mind,—Consent, an essential element in Contract and Transfer—Infancy or minority—The age of majority in various countries—Brahmanic law—Roman law—The principle of Roman law substantially followed in modern Europe—Mussalman law—English law—British Indian law, Act IX of 1875—Acts of minors, effect of—Brahmanic law—Roman law—Mussalman law—Acts of minors, voirdable under the English law—*Goode* v. *Harrison*—*North Western Railway* v. *McMichael*—*Williams* v. *Moor*—Lord Mansfield's Observation—The British Indian legislature—The Contract Act—*Soshi Bhushan Dutt* v. *Judu Nath Dutt*—Unsoundness of mind—Brahmanic law—Roman law—English law—Langdale, M. R., his observation—*Molton* v. *Camroux*—*Browne* v. *Joddrell*—*Deane* v. *Viscountess Kirkwall*—*Matthews* v. *Baxter*—Mussalman law, *Majnun* and *Matuh*—Duress or Coercion—Brahmanic law, *bhaya*—Roman law, *Metus* and *Vis*—English law—*Atlee* v. *Backhouse*—*Skeate* v. *Beale*—Anson's explanation of Duress—The British Indian law—The Contract Act—*Guthrie* v. *Abul Mozaffar*—*Moung Showay* v. *Ko Byaw*—Regulation XXXVIII of 1793—Special cases of disability—The Bengal Tenancy Act—s. 173, cl. 2—The Transfer of Property Act, s. 136—The Court of Wards Act—Disqualified Proprietors—Prodigals under the Roman and Mussalman law—*Jumoona Dassya* v. *Bama Sundari Dassya*—*Dhunput Sing* v. *Shoobhudra Kumari*.

Land is at once the basis and the most prominent illustration of immoveable property. The possession of land has at all times been associated with a kind of dignity, if it has not always carried with it the stamp of extraordinary privileges. In ancient India, religion gave the law; and thus the capacity of performing religious ceremonies was also the measure of the capacity to hold and acquire land. In Rome, the Patricians, or the men of *family*, were at first the sole possessors of land. Rome soon became political, and the rule of religion which originally excluded the Plebs, was at length transformed into a rule of law, and debarred the peregrini or the alien from any share of the Roman land. Indeed, the law did not recognize any rights in an alien; for none could be

enforced in a court of justice.[1] This unsocial rule, as it has been called, of mediæval Rome, found its way into the legislature of modern Europe. It was not until the year 1819 that the *droit d'aubaine*, or the right of the Crown of France of succeeding to the effects of a deceased alien, was abolished, and a foreigner has now been enabled to buy and hold land in France without any permission from the sovereign power.[2] In England, until quite recently, aliens laboured under very serious disabilities. Prior to 7 and 8 Vict. c. 66, all other purchases made by an alien except a lease for years of a house for his habitation, in case he were an alien friend and merchant, were liable to be immediately forfeited to the sovereign.[3] By that statute, every alien residing in any part of the United Kingdom, and being the subject of a friendly state, was permitted to take and hold any lands, houses or other tenements, for the purpose of residence or occupation by him or his servants, or for the purpose of any business, trade or manufacture, for a term not exceeding twenty-one years, as fully as if he were a natural-born subject; except as to any right to vote in respect thereof, at the election of members of Parliament.[4] And, if lands were purchased by a natural-born subject in trust for an alien, the Crown might claim the benefit of the purchase.[5] However, by the Naturalization Act of 1870,[6] real and personal property of every description may now be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien in the same manner in all respects as through, from, or in succession to, a natural-born British subject. Nevertheless, an alien cannot acquire property in a British ship.[7] In the early years of British rule, the British Indian Legislature forbade Europeans of whatever nation or description to purchase, rent or occupy, directly or indirectly, any land out of the limits of the town of Calcutta without the sanction of the Governor-General in Council.[8] And this, in the words of the Regulation, arose "from a regard to the prejudices of the natives, and with a view to promote their ease and happiness, and to obviate the evils that would necessarily have resulted from allowing any persons, not amenable to the Provincial Courts of Judicature

[1] "Si cum gente aliqua neque amicitiam, neque hospitium, neque fædus amicitiæ causâ factum habemus, hi hostes quidem non sunt. Quod autem ex nostro ad eos pervenit, illorum fit, Idemque est, si ab aliis ad nos aliquid perveniat." Austin, 298.

[2] Pailliet, Manuel de droit Francais 10, in Mackenzie's Roman Law, 80.

[3] Stephen's Commentaries, 482.

[4] *Ibid*, 483.

[5] *Barrow* v. *Wadkin*, 24 Beav. 1.

[6] 33 Vict. c. 14, s. 2.

[7] Anson on Contracts, 103.

[8] Reg. XXXVIII of 1793, s. 3.

in common with the natives, to purchase or rent estates without restriction or limitation, or to hold any land whatever, excepting for the erection of dwelling houses or buildings for manufactures or other commercial purposes." Nearly half a century afterwards this rule was abrogated, and it was deemed lawful for any subject of the sovereign of England to acquire and hold in perpetuity or for any term of years, property in land, or in any emoluments issuing out of land, in any part of the territories of the East India Company. And British subjects of all denominations were thus placed precisely on the same footing as the Natives in respect of the acquisition of land.[1] With regard to the subjects of foreign states, the British Indian Legislature is not quite clear, but it must be presumed to stand where it was in 1793, when all Europeans without distinction were regarded as foreigners. But note the words of Lord Brougham in 1836, that "the English law incapacitating aliens from holding real property to their own use and transmitting it by descent or devise has never been introduced into the East Indies, so as to create a forfeiture of lands held in Calcutta or the mofussil by an alien.[2] Under the provisions of Act III of 1864, however, foreigners seem to occupy a somewhat precarious position. For "the peace and security" of British India, that Act enables the Government to prevent the subjects of foreign states from residing or sojourning in this country, and gives the Governor-General of India in Council the power to order any foreigner to remove himself from British India. This Act evidently proceeds on the lines laid down in Regulation XI of 1812. Section 3 of which runs as follows:—"Whenever any body of emigrants, or any individuals belonging to such body, shall be ordered to be removed from the part of the country in which they may have been established, they shall be allowed to dispose of any property which they may have acquired in such manner as they may judge proper; provided, however, that if they shall nevertheless retain the right to any real property at the period of their actual removal, it shall be competent to the Governor-General in Council to order such property to be sold by public auction under the superintendence of the Collector of the District." Such, in brief, is the history and nature of the restrictions on the power of aliens to hold and acquire land in British India, and restrictions of this character are generally known under the name of political disability.

Somewhat analogous to this is the disability which attaches to an offender upon the commission of some heinous offence. Such disability acquired in England the specific name of attainder. The rule was of a most severe character. The effect of it was not only to disentitle the offender from acquiring property; but to deprive for ever his descendants from taking property through him. Attainted

[1] Act IV of 1837.

[2] The *Mayor of Lyons* v. *The East India Company*, 1 M. I. A., 175. Cf, The Martin's Case, 1 Ful. 257.

persons were those who might have committed the offence of treason or felony, and it is hardly necessary to say that such persons "could not, by any conveyance which they might make, defeat the right to their estates which their attainder gave to the Crown, or to the lord, of whom their estates were holden."[1] Forfeiture for treason and felony has since been abolished by 33 and 34 Vict. c. 23.

The English law of attainder has in a modified form been reproduced in the British Indian Legislature. It has been prescribed that, in every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned. Further, whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government; and whenever any person shall be convicted of any offence for which he shall be transported, or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rents and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependents as the Government may think fit to allow during such period.[2] It will be seen at once that any of these persons is not so much as incapable of acquiring property, as of holding property, and, therefore, of transferring the same. They are, in fact, reduced to the condition of mere instruments or conduit-pipes through whom the property is passed on to the Crown, the moment it is acquired by them. In the North-Western Provinces,[3] persons convicted of a non-bailable offence may be treated as disqualified proprietor, and the management of their estates may be assumed by the Court of Wards, the effect of such assumption being the cessation of the proprietary rights of such persons. And any disposition made by them of their property will be rendered void unless effected through the intervention of the Court.

Closely connected with the above is the disqualification which is found to arise from insolvency or bankruptcy. The relation between a creditor and a debtor has in all ages been the subject of grave discussion. Whether fabulous or otherwise, under the Roman law of the XII Tables, a contumacious debtor was delivered up to his creditor that he might be cut up into shares.[4] Aulus Gellius remarks on the exceeding barbarism of the law in sanctioning the killing of debtors and dividing their bodies among their creditors.[5] Afterwards, the

[1] 2 Black Com. 290.

[2] The Penal Code, ss. 61, 62.

[3] Act XIX of 1873, s. 194.

[4] Ortolan's Roman Law.

[5] Hunter's Roman Law, 874.

debtor could be sold as a slave or given in *mancipio*, whereby he not only lost all his existing rights, but was disabled from acquiring any new rights. According to Manu, a debtor, upon whom neither friendly admonitions nor a suit in court will prevail, may be bound by thongs or fetters, and thus compelled to pay his debt.[1] But, under the later Brahmanic law, it would seem, the king became a sort of official assignee, and in that capacity might compel the debtor to pay his debts by enforced labour.[2] Under the later Roman law, imprisonment for debt was abolished except in the case of bad faith.[3] And the rule in cases of insolvency, which met with the approval of the Preators, was, that an absconding or fraudulent debtor should cease to have and enjoy his property, and his possessions may be sold under the direction of a manager elected by the creditors. The result of this provision was, that the debtor was for ever released from his past debts.[4]

Under the Mussulman law, an insolvent is one against whom there are debts equal to, or exceeding the amouut of, his whole property. If a debtor, it is said, make an acknowledgment whilst under inhibition (*hajr*) of the Cazi or the Court, such acknowledgment is not binding upon him until he shall have satisfied his creditors; for as their right was first connected with his property he is, therefore, not at liberty to annul it by an acknowledgment in behalf of any other person. It would seem, however, that under this law, his dispositive power was not affected with respect to property that might have been acquired after inhibition. The Cazi also has the power to imprison the debtor and hold him in durance until such time as he sell his property for the discharge of his debts, and the rendering of justice.[5]

In British India, the legal incidents of insolvency are governed by the rules of the Civil Procedure Code in the Mofussil, and in the Presidency towns by Statute 11 and 12 Vic., c. 21. Under the Code, if the Court is satisfied with the *bonâ fides* of an insolvent debtor, it may either discharge the debtor with or without appointing a Receiver in whom when appointed will vest all the properties of the debtor; but in either event, the property of the debtor, whether previously or subsequently acquired, shall by order of the Court be liable to attachment and sale until the decrees against him held by the scheduled creditors are fully satisfied or incapable of being executed. However, if the aggregate amount of the scheduled debts is two hundred rupees or a less sum, the Court may, and in any case after the scheduled debts have been satisfied to the extent of one-third, or after the expiry of twelve years from the order of

[1] Manu's Institutes, c. 8, v. 49.

[2] *Ibid*, v. 177.

[3] Hunter's Roman Law, 876.

[4] D. 42, 4, 7, 1. Note this passage :—*Prætor ait, qui fraudationis causa latitabit ejus bona possideri vendique jubebo.*

[5] Hamilton's Hidáya by Grady, 531.

discharge, the Court shall declare the insolvent discharged as aforesaid, absolved from further liability in respect of such debts.[1] Under the Statute, upon insolvency and under the direction of the Court, "all the real and personal effects of the debtor (with the exception of a few articles as is also provided in the Code) whether within the limits of British India or without, and all debts due to him and all the future estate, right, title, interest and trust of the debtor in or to any real or personal estate or effects within or without the said territories, which such petitioner may purchase or which may revert, descend, be devised, or bequeathed, or come to him, and all debts growing to him before the Court shall have made its order in the nature of a certificate shall vest in the official assignee of the Court, and all books, papers, deeds, and writings in any way relating to the debtor's estates and effects in his possessions or under his custody or control, shall be deposited with such assignee, and such order shall be entered on record in the said Court, and such notice thereof shall be published as the said Court shall direct; and such order when so made, shall relate back to, and take effect from, the filing of the petition of insolvency, and shall instantly and without any conveyance or assignment, vest all the real and personal estate, effects and debts as aforesaid in the said official assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same." The official assignee will alone receive the insolvent's estate under the direction of the Court, and have power to institute and defend actions and suits which the insolvent might have commenced and prosecuted and defended. He alone has also the power to make sale of insolvent's estate. The Statute also enacts that "whenever it shall appear that the estate of any insolvent, which has come to the hands of his assignee, has sufficed to pay one-third of his debts, or that a majority in number and value of the creditors whose debts are admitted by the schedule or established by proof have consented to such application, it shall be lawful for the said Court at any time after the hearing of his petition, upon the application of the insolvent by petition, to make an order *nisi* for his discharge in the nature of a certificate, and such order shall specify the creditors whose demands are thereby sought to be discharged, and shall appoint a time for the further hearing of the said petition, and shall direct such notice to be given of such order in the meantime as it shall think fit, and in case any of the creditors against whom such discharge shall be sought shall appear to the Court to be resident without the limits of British India, to cause notice of such order or of so much thereof as may appear necessary, to be inserted in the Gazette of the Presidency; and upon the further hearing of such petition, it shall be lawful for the said Court, to make such order absolute, or to dismiss such petition, or to adjourn the further hearing

[1] The Civil Procedure Code, Ch. XX.

thereof, or to make such order therein as shall be just; and such discharge, unless order shall be made to the contrary, shall extend to and shall discharge the Insolvent personally, and also his after-acquired property, from the demands of all the creditors named in the said order *nisi*." Some distinctions are made in the Statute between a trader insolvent and other insolvents.[1] The point, however, which demands consideration, is that the insolvent until his discharge becomes in respect of his proprietary rights a person *civiliter mortuus* and incapable of holding, acquiring or disposing of property.[2]

We shall next proceed to consider the case of persons who, by reason of weakness or imbecility of mind, are in the contemplation of law incapable of entering into contracts or managing their affairs. These, as we shall see by and by, may, under the British India law, be classed under two heads :—(1) Persons who are not under the protection of the State and (2) Persons who are under such protection.

Consent, it should be observed, is the essential element of a contract, or agreement enforceable by law. In the Prussian Code, a contract is defined to be a mutual consent for the purpose of acquiring or disposing of a right.[3] Every transfer *inter vivos* is based upon, or preceded by, a contract; and under the Transfer of Property Act,[4] none but a person who is competent to contract can transfer property. One has, therefore, to refer to the Contract Act[5] in order to find out who are those persons that are incompetent to enter into a contract. The very first sentence of section 11 of the Act is in these words :— "Every person is competent to contract who is of the age of majority." This is an universal rule; but there is not the same consensus as to what should be regarded as the age of majority. Upon that question jurists have differed, and the rule has varied in different countries. "The age," observes a French author, "when a person may be said to be able to carry on the affairs of life without the assistance of another is not the same for every individual; the faculties of the mind, social position, and physical capacity present such striking differences, that it has been found to be difficult to lay down one uniform rule for all."[6] Under the Brahmanic law, although the exact age of majority does not appear in any of the texts of Manu, Kullûka, the celebrated commentator, lays it down, upon the authority of Narada, that a child at the age of sixteen ceases to be a minor (*poganda*).[7] Nevertheless, it is apparent from another gloss that

[1] See, ss. 7, 59, 60, &c.

[2] See, Kerakoose *v.* Brooks, 8 M. I. A. 339.

[3] Les Codes Civils étrangers, *par* Saint-Joseph, Introduction, LXVII.

[4] Act IV of 1882, s. 7.

[5] Act IX of 1872.

[6] Les Codes Civils étrangers, *par* Saint-Joseph, Introduction, XXX.

[7] Pundit Bharatchandra Siromoni's Institutes of Manu, c. 8 v. 148: Nárada :—(बाल्यः षोडशवर्षात् पोगण्डश्चापि सप्तदशः

a twice-born person is understood to be incapable of undertaking worldly affairs until the age of thirty-six.[1] According to Roman law, the period of majority varied from fourteen to twenty-five years. At fourteen a person was considered to have attained the age of puberty; but twenty-five was deemed to be the perfect age (*perfecta ætas*). The principle, which obtained in Rome, has substantially been established in modern Europe, where the age of twenty-one may be regarded as the general rule of majority. In Turkey, fifteen is reckoned to be the full age, eighteen in Denmark, and in Holland a person is deemed to arrive at maturity when he is of twenty-three years of age or upon marriage. Twenty-four is the age of majority in Austria and Prussia, and twenty-five in Portugal and Norway.[2]

In Mussulman law, puberty is no doubt the test of majority; but the completion of the eighteenth year for males and that of seventeen years for females may be accepted as the genernal rule of majority. It is worthy of note that for certain purposes twenty-five is reckoned to be the full age under that law.[3]

In English law, the contractual age is prescribed to be twenty-one years in the case of both males and females; but it is laid down, in accordance with the dictates of the Roman law, that in matrimonial matters, (and the English law, it should be observed, considers marriage in the light of a contract, and, indeed, "the most important contract of any")[4] the age fixed by law for consent is fourteen in males and twelve in females.[5]

In British India, the law of majority is laid down in Act IX of 1875. Section 3 of the Act is to this effect:—"Every minor of whose person or property a guardian has been appointed or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of *twenty-one years* and not before; subject as aforesaid every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of *eighteen years* and not before." Under the Indian Succession Act, a person is said to come of age when he attains the age eighteen years.[6] With regard to European British subjects who are not

[1] Kulluka's Gloss, Manu, c 8, v. 7.

[2] Les Codes Civils Étrangers, *par* Saint-Joseph; Introduction, XXXI.

[3] Hamilton's Hidáya, pp. 527—529.

[4] Stephen's Commentaries, Vol. 2, pp. 254, 256.

[5] Note that Manu fixes the age of thirty-six as the period when a twice-born man can marry and settle down: षट्त्रिंशदाब्दिकं चर्यं गुरौ त्रैवेदिकं व्रतं (c. 3, v. 1) and then गृहस्थाश्रममावसेत् *i. e.*, in the words of Kullúka a twice-born man should take a wife (गृहस्थः गृहशब्दस्य दारवचनत्वात्): Pundit Bharatchunder Siromoni's Manu Sanhita, v. 110, *gloss.*

[6] S. 3.

domiciled in British India, the subject is not wholly free from doubt.[1] It should be noted that there is a saving clause in the Majority Act,[2] in regard to the capacity of any person to act in matters of marriage, dower, divorce and adoption. Such capacity is said to be governed by the personal law or usages of the class to which the individual may happen to belong.

We shall next proceed to consider the legal consequences, if any, which arise from the acts of a minor or a person of non-age.

Under the Brahmanic law, the acts of a minor which relate to contracts are wholly devoid of legal consequences. "That which is done by a minor (बालः) in the way of transfer," such are the words of Nárada, "is void or not done at all" (अदत्तं).[3] According to Roman law, the legal consequences, of the contracts of minors varied in view of the particular periods of minority. The Roman jurists, as Ortolan informs us, in determining the various periods of minority, adopted the rule of the ancient philosophers and physicians that the mental and physical organization of a human being underwent a sort of revolution at the end of every seven years.[4] In the technical language of the Roman law, an infant is described to be a person under the age of seven years,[5] and an *infanti proximus* is a persen between the ages of seven and ten and a half. From ten and a half years of age up to fourteen years a person was said to be *pubertati proximus*. On attaining the age of fourteen a person was said to be *puber*. Nevertheless, minority was considered to last, for certain purposes, till the age of twenty-five. An infant or an *infanti proximus* was wholly incompetent to enter into any contract. "A pupillus," says Justinian, "may bind another to him without the sanction of his guardian; but this must be understood of a pupillus who has some understanding (*aliquem intellectum habet*); for an infant or an *infanti proximus* has no understanding (*nullum habet intellectum*)."[6] There seems, however, to have prevailed some difference of opinion among the jurists on this subject, and it may, on the whole, be concluded that a child from the moment he was able to speak, although he was under the age of puberty could by contract bind others to himself; but could not bind himself to others. He could make himself a promisee but not a promiser, a creditor but not a debtor. When, for instance, the pupil stipulated for something to be given to him, the authority of the guardian was not requisite; but if the pupil made the promise it would be requisite; for "pupils

[1] See, however, Cunningham's Contract Act, 52, Stokes's Indian Succession Act, 201, clause 9.

[2] S. 2, clause *a*.

[3] Vyávahara Mayukha.

[4] Ortolan vol. 3, p. 209: C'etait une opinion des philosophes et des médicins de l'antiquité, que de sept ans en sept ans il s'accomplit dans l'organisation humaine une révolution.

[5] Infanti, id est minoris septem annis, Cod. Just. 6, 30.

[6] Justinian's Institutes, Lib. iii, Til. XIX, 9 and 10.

might make their condition better; but not worse."[1] In these cases, however, the rule of equity interfered, namely, that no one could enrich himself by the detriment of another (*Jure naturæ æquum est, neminem cum alterius detrimento et injuriâ fieri locupletiorem*),[2] and if an infant happened to derive some profit from a contract, he would be compelled by the rule of equity to give up this profit upon the rescission of the contract. In other words, the parties to the contract upon such a contingency should be restored as much as possible *in statu quo*. For instance, although an infant could not be proceeded against for any negligent act with regard to a deposit, he would be compelled to give it up. Again, if an infant had sold anything, he could not be compelled to deliver it; but if he had received any portion of the price he would be compelled to return all the money which he had not lost or spent by means of his folly.[3] A person above the age of puberty was fully competent to enter into every species of contract; but with this qualification that up to the age of twenty-five, any person was at liberty to apply to the Court for the rescission of a contract, and relief was given if it was found to inflict a serious loss upon the minor. The question which the Prætor had to determine in such a case was whether, having regard to the circumstances at the time, the contract was an imprudent one.[4] If, however, on attaining the age of twenty-five, a person ratified any contract previously entered into by him, he was absolutely bound by it. On the whole, under the Roman law, any contract entered into by a person under the age of twenty-five was, as we should now say, voidable, and not absolutely void.

In Mussulman law, the contracts of an infant (*sagir*, صغير) are all invalid, and there is no right of action in respect thereof. "No contract entered into or an acknowledgment made by an infant," in the words of the Hidaya, "is valid."[5]

The English law on the capacity of infants is one of some difficulty; but it may be said to follow in the main the principles of the Roman law. In Co. Litl. 2, *b*. we read;—"an infant or minor hath without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age, he may either agree thereunto and perfect it, or without any cause to be alleged, waive or disagree to the purchase, and so by his heirs after him, if he agreed not thereunto after his full age." In Bacon's Abridgment[6] the rule is thus laid down:—"The rights of infants are much favoured in law, and regularly their laches should not be prejudicial to them, upon a presumption that they under-

[1] *Ibid.*, Lib. i, Til. XXI, 1. See, Hunter's Roman law, 427.

[2] I. 50, 17, 206.

[3] Ortolan, vol. 11, 182.

[4] Hunter's Roman Law, 428.

[5] Hidáya, vol. 3, Book XXV, c. 1, on *Hajr*,

[6] Infancy and Age (G).

stand not their right, and that they are not capable of taking notice of the rule of law, so as to be able to apply them to their advantage." In *Goode* v. *Harrison*,[1] Best J. is reported to have observed that "the contract of an infant is not absolutely void from the beginning; for if void the infant himself could take no advantage of it. It has, however, been decided that an infant may be a partner, and may take advantage of a partnership contract. Here, the infant, by holding himself out as a partner, contracted a continual obligation, and that obligation remains till he thinks proper to put an end to it. He continued that obligation when he became of age, when he became capable of managing his own concerns; and if he wished to be understood as no longer continuing as a partner, he ought to have notified it to the world. Not having done so, I think that contract which was voidable only in the first instance, became absolute against him." In *North-Western Railway* v. *McMichael*,[2] Parke, B. observed, "infants having become shareholders in Railway Companies have been liable to pay calls made whilst they were infants. They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby become liable to all the obligations attached to the estate, for instance, to pay rent unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which time it is competent for him to do so. Whilst he is an infant he is incompetent to decide whether he ought to waive his purchase or not, and in the meantime he ought to be at liberty, or his guardian for him, to get rid of the liability, by showing that it was a prejudicial contract. The more reasonable view of the case is that an infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession and has not disclaimed—at all events unless he stil be a minor."

It appears to be clear from the decisions that the acts of infants are absolutely binding upon them in respect of their contracts with regard to necessaries. "The contract of an infant," observes Parke, B. in *Williams* v. *Moor*,[3] "for goods sold and delivered, *not being necessaries*, is as completely void as is his contract on an account stated, if by the word void is meant *incapable of being enforced*." The conclusion that may be arrived at from a study of the reports

[1] 5 B and Ad, 159.
[2] 5 Exch Rep. 124.
[3] 11 M. and W., 256.

is that, with the exception of contracts for the supply of the necessaries of life suitable to the position of the infant which will vary according to circumstances, all contracts entered into by an infant are voidable and not absolutely void; but where an infant by reason of any contract entered into by him has derived some benefit, he must take the benefit with the obligation. The privilege of infants, in the forcible words of Lord Mansfield,[1] "is a shield and not a sword," and, therefore, if an agreement be for the benefit of an infant at the time, it shall bind him. This rule has also the support of Lord Hardwicke.[2] It would, indeed, appear that where the contract is not merely executory but executed in the whole or in part, and the parties cannot be restored altogether to their original position, the contract of an infant unless the other party has knowingly taken advantage of the infant cannot be avoided.[3]

Under the British-Indian law, it is laid down in the first place that "all agreements are contracts if they are made by the free consent of parties *competent to contract*," and it is then said that "every person is competent to contract who is of the age of majority."[4] It therefore follows that agreements made by a person who is not of the age of majority are not contracts or agreements enforceable by law, or in other words void *ab initio*. Whether that be the true construction of the section of the Contract Act or not, the Courts of this country have broadly held that the law here is precisely on the same footing as it is in England, or in other words that contracts entered into by an infant are voidable at the option of himself or his representative, and not absolutely void. In *Sashi Bhusan Dutt* v. *Jadu Nath Dutt*,[5] a minor through his next friend instituted a suit on a bond given for the value of certain goods; the defendant admitted the bond, but contended that it was not enforceable, inasmuch as the plaintiff, one of the contracting parties, was a minor at the time the bond was given. The Court found that there was no valid contract which could be lawfully enforced on either side, one of the contracting parties having been a minor; and that consequently there was no valid contract under s. 10 of the Contract Act, and therefore dismissed the suit contingent on the opinion of the High Court, as to whether, having regard to s. 10 of the Contract Act, a minor who is the obligee of a bond given for the value of certain goods, can sue upon it? Thereupon, Garth, C. J. observed: "The only point which is referred to us in this case is, whether having regard to section 10 of the Contract Act, a minor, who is the obligee of a bond given for the value of certain goods, can sue upon it, the Munsiff considers that he cannot, because the bond is void, as having been entered into by a party not competent to contract, we think this is a mistake.

[1] *Zouch* v. *Parsons*, 1 W. Bl., 575.
[2] *Maddon* v. *White*, 2 T. R., 159.
[3] *Molton* v. *Camroux*, 4 Exch. 17.
[4] Act IX of 1871, ss. 10, 11.
[5] I. L. R. XI, Cal. 552, 553.

It is true that the language of the Indian Contract Act may well have led to the mistake; but we consider that the law here is the same as it is in England. A contract entered into with a minor is only *voidable* at the option of the minor." It must therefore follow that when a Court rescinds a contract at the instance of a minor or his representative, the minor shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.[1] It was said in *Muhammad Mohidin* v. *Ottayil Ummache*,[2] in conformity with the English doctrine, that "on avoidance of a contract the parties are to be placed in the same position as if it had never been made, and when this is no longer possible, avoidance cannot take place." Under the British-Indian law, a person, who is under the age of majority may be admitted to the benefit of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligation of the firm. However, a person, who has been admitted to the benefits of partnership under the age of majority, becomes on attaining that age liable for all obligation incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership."[3]

Another ground of incapacity arising from want of intellect or judgment is unsoundness of mind. This unsoundness of mind may arise from various circumstances such as idiotcy, lunacy, intoxication, or disease. Under the Brahmanic law, an idiot (मूढ़ः), a lunatic (उन्मत्तः), an intoxicated (मत्तः), or a diseased person (आर्त्तः), is, in the words of Nárada,[4] incapable of entering into a contract, and therefore all his acts in matters of transfer are absolutely void (अदत्त). It is, however, important to note this passage which some have attributed to Yajnavalkya and others to Brihaspati:—"That which has been purchased at a low price from an insane or intoxicated person, or from one that is *alieni juris*, or rather a persons who is under the power of another, or an idiot shall be restored to the seller."[5] It would thus appear that the acts of infants and others are not totally void, and can be annulled only when there is a suspicion of undue advantage. In Roman law, a madman cannot perform any legal act, and therefore all agreements entered into by him are absolutely void or *inutilis*, *i. e.*, they are incapable of producing any tie binding on the parties to them.[6] "*Furiosum*," in the words of Gaius, "*sive*

[1] The Contract Act s 64.

[2] 1 Mad. H. 390.

[3] The Contract Act ss. 247, 248.

[4] Vyávahára Mayukha.

[5] मत्तोन्मत्तेन विक्रीतं हीनमूल्येन येन वा। अस्वतन्त्रेण मूढ़ेन त्याज्यं तस्य पुनर्भवेत॥ See, Vyávahára Mayukha and Viramitrodaya.

[6] Justinian's Institutes, Lib. III, Til. XIX, 8.

stipulatur sive promittat, nihil agere natura manifestum est." In other words, madmen can neither be obligors nor obligees.[1] But stipulations, and promises made by madmen during lucid intervals (*in dilucidis intervallis*) are regarded to be valid.[2]

In English law, a person of unsound mind and an intoxicated person are generally placed in the same category, and their contracts are for the most part assimilated to those of infants. To determine the question of insanity is sometimes of no inconsiderable difficulty. "There is no subject," observes Langdale, M. R.,[3] "more difficult to investigate and satisfactorily to adjudicate upon in courts of justice than the state of a man's mind, with reference to his sanity or insanity, for the purpose of determining whether he is legally bound by or answerable for his acts, and independent of the difficulty of forming a distinct idea of what ought to be understood by the expression "soundness of mind." It is in many cases most difficult to determine, what indications of alleged unsoundness ought to be relied upon, and to distinguish between an insane man's delusions, and the erroneous opinions or the mistaken notions af a man, who is admitted to be generally of sound mind. A man may be subject to some delusions, and one of the means, and perhaps the most accurate means, of judging whether these apparent indications ought to be relied upon as proving a general unsoundness of mind, is by a comparison of the alleged acts of insanity with other acts of the same person and the general course of his life; so that, on questions of insanity, a great deal more is to be taken into consideration than the particular acts of imputed insanity. When a man's ways and general course of life are such as to indicate sanity and a knowledge of his affairs, proof of one or more particular acts, though very strange in themselves, and though affording some grounds for imputing insanity, would not be a sufficient proof to show that all his acts were done under the delusion of insanity. On the other hand, where a man is thought by various persons to have been insane at a particular period, and to have so continued ever since, proof of one or more acts done afterwards apparently in the manner of a man of sound mind, would not, if unaccompanied by other proofs and the application of some test or inquiry, prove, that the acts done were done under circumstances free from delusion, or what is quite as much of importance, free from the influence to which persons acting under insane delusions are confessedly liable." *Molton* v. *Camroux*[4] is a leading case on the subject of the effect of contracts entered into by persons of unsound mind. That was an action for money had and received brought to recover from the defendant (as Secretary to an Assurance and Annuity Society) two sums paid by a certain intestate in his lifetime, as the price or consideration for two

[1] I. 44, 7, 1, 1, 2.

[2] Ortolan, 207.

[3] *Snook* v. *Watts* 11 Beav. 107.

[4] 2 Ex. 500.

annuities granted by the Society, determinable with his life. At the trial, the money was claimed upon the ground, among others, that the grantee was not of sound mind at the time the contract was made, and was therefore incapable of contracting, and, there being no contract, or a void contract, the money was recoverable: on a motion for new trial, POLLOCK, C. B. observed:—"As to the rule of the common law, the older authorities differ. According to the opinion of Littleton, s. 405, and Lord Coke, 1 Inst. 247, *b*, and Beverley's case (disagreeing with *Fitzherbert's* "*Natura Brevium*" 202) no man could be allowed to stultify himself, and avoid his acts, on the ground of his being *non compos mentis;* but certainly the law did not allow the party himself to set aside, by any plea of insanity, acts of a public and notorious character, such as acts done in a court of record, and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed, unless a party appeared to be of sound mind. The purchase also by a lunatic was valid, and vested the estate; and though his heirs might disagree to it, he could not. But the rule as above laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it. * * * * * As far as we are aware, this is the first case in which it has been broadly contended, that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, *bonâ fide*, reasonable, and without notice on the part of those who have dealt with the lunatic. On looking into the cases at law, we find that, in *Browne* v. *Joddrell*, LORD TENTERDEN says, "I think the defence of unsoundness of mind will not avail, unless it be shewn that the plaintiff imposed on the defendant. * * * In *Dane* v. *Viscountess Kirkwall*, Mr. Justice *Patteson*, in directing the Jury, said, "It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it." We are not disposed to lay down so general a proposition, as that all executed contracts *bonâ fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject matter of the contract has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased." It should be observed that in the foregoing case it was found that the intestate at the time of the transaction was a lunatic and of unsound mind so as to be incompetent to manage his affairs; but of this, the Society had not

at that time any knowledge, that the purchases of the annuities were transaced in the ordinary course of human life, and the granting of the annuities to him in the manner and upon the terms before mentioned were fair transactions, and transactions of good faith on the part of the Society, and in the ordinary course of business. The modern doctrine on the subject may be thus laid down, that a man or his representatives are entitled to show that he was so lunatic or drunk as not to know what he was about when he made a promise; but the defence cannot prevail when the state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, especially when the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position.[1] In Hall *versus* Warren, Grant, M. R. observed, "The objection that the defendant was not competent, having been insane at the time the contract bears date is matter of fact; the law upon the subject is, that all acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period."[2]

In *Matthews* v. *Baxter*[3] there was a declaration for breach of contract in not completing the purchase of houses and land bought of the plaintiff at a sale by auction, the plea on the part of the defence was to the effect that at the time of making the alleged contract, the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew; but the replication was that after the defendant became sober, and able to transact business, he ratified and confirmed the contract. Kelly, C. B., there said, "It has been argued that a contract made by a person who was in the position of the defendant is absolutely void; but it is difficult to understand the contention. For, surely, the defendant, upon coming to his senses, might have said to the plaintiff:—"True, I was drunk when I made this contract, but still I mean, now that I am sober, to hold you to it." And if the defendant could say this, there must be a reciprocal right in the other part. The contract cannot be voidable only as regards one party, but void as regards the other; and if the drunken man, upon coming to his senses, ratifies the contract, I think he is bound by it."

Under the Mussulman law, all acts, acknowledgments or contracts by a lunatic (*majnun*) are invalid, except when done, made, or entered into during a lucid interval (*mátuh*).[4]

The subject of incapacity arising from idiotcy, insanity, and drunkenness is thus disposed of by the British Indian Legislature. It is first of all said that a person is not competent to contract if he be not of sound mind, and then we are

[1] See 4 Exch. R. 17.

[2] 9 Ves., 609, 610.

[3] L. R. 8 Exch., 132.

[4] Hidáyá, Book XXV, c. 1.

told what is a sound mind for the purpose of contracting. Section 12 of the Contract Act runs thus:—"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind." The effect of this provision is clearly to render void all contracts entered into by persons, whose minds are unsound at the time of the transactions; but it may be presumed that the Indian courts will observe the same equities in dealing with these transactions that are observed in the English courts. It may be noted that as in the case of infants, so in the case of persons of unsound mind, contracts for necessaries will bind at least the property if not the person of the *non compos*. "If a person," in the words of the Contract Act, "incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be re-imbursed from the property of such incapable person."[1]

Closely analogous to the incapacities which have been enumerated above is the incapacity to transfer which is supposed to arise from duress or coercion. In such a case a person is considered to have no will at all, or at all events is not in a position to give his free consent with respect to the transaction.

Under the Brahmanic law, a transfer made by a person who is, in the words of Národa, under the influence of fear (भय) or completely under the power of another so as not to possess an independent will of his own (अस्वतन्त्र) is absolutely void (अदत्तमिति तत् स्मृतम्).[2]

In Roman law, any transaction that has been entered into through fear is deemed to be of no account. "*Quod metus causa gestum erit*," such is the *dictum* of *Ulpian*, "*ratum non habebo*."[3] *Metus* is explained to be the trepidation of mind which proceeds from the expectation of immediate or future danger (*metus instantis vel futuri periculi causa mentis trepidatio*). According to Gaius, the fear that would vitiate a transaction is not the fear of a weak man, but the fear of a man of ordinary firmness.[4] Allied to *metus* or fear is, according to the jurists, the element of *vis* or force. *Vis* is defined to be that violent force

[1] The Contract Act, s. 68. Consult, *Chappel* v. *Cooper*, 13 M. and W. 252.

[2] Vyávahára Mayukha.

[3] D. 4, 2, 1.

[4] D. 4, 2, 6: "Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus."

which cannot be repelled.[1] In the words of *Ulpian*, any transfer made under the influence of force or fear should be restored to the transferrer.[2]

Under the Mussulman law, as under any other, mutual consent of the parties is necessary to a valid transfer, and it would appear from the Chapter on Sales[3] that if a sale should take place without the free consent of the seller, it must be regarded as invalid; but the seller will not be allowed to resume the property unless he shall have first restored any advantage that he might have derived from the sale in the shape of price or otherwise. I do not, however, find the subject of duress or coercion specifically treated of in the Hidaya in respect of contract or transfer.

The English law on the subject of duress as a ground of incapacity to enter into a valid contract is not altogether without difficulty. Note the observation of PARKE, B., in *Atlee* v. *Backhouse*,[4] "there is no doubt of the proposition that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think the law is clear, although there is some case in Viner's Abridgment to the contrary, that in order to avoid a contract by reason of duress *it must be duress of a man's person*, not of his goods; and it is so laid down in Sheppard's Touchstone; but the ground is that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if while goods are in the possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress." In the same case, LORD ABINGER, C. B., thus observes:—"All the cases that have been cited, if they are examined properly, and without the bias that naturally belongs to counsel who examine them in the support of their clients case, will be found to be cases of the nature—when property has been unlawfully seized, or unlawfully detained, for the purpose of enforcing the payment of money that was not due. In all those cases, (and there is a great series of them) the party against whom the goods have been wrongfully seized or detained, is entitled after payment of the money, to bring an action for money had and received, to try the right: as in the case of tolls,—where a man seizes property for toll, and exacts more than is due, the party is entitled to bring an action for money had and received: and so in the case of the having possession of a license, the property of the plaintiff, and refusing to deliver it unless more money is

[1] Paulus:—Vis autem est maioris rei impetus, qui repelli non potest.

[2] Ulpian: (D. 4, 2, 3) "Continet igitur hæc clausula et vim et metum, et si quis vi compulsus aliquid fecit, per hoc edictum restituitur."

[3] Hidáyá, Book XVI, c. 5.

[4] 3 Mees. and W., 650.

paid than is due; in all these cases it will be found that the seizure and detention were *for the purpose of* exacting money."[1] *Atlee* v. *Backhouse* was apparently followed in Skeate *against* Beale.[2] DENMAN, C. J., there said, "We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal. And with regard to the former, the law is laid down in 2 Inst. 483, and Sheppard's Touchstone, 61, and the distinction pointed out between duress of, or menace to, the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert."[3] The term, duress, has been thus explained in English law, namely, it consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party himself, or his wife, parent or child; and it must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge or for his advantage.[4] It should be observed that *extortion* under the Indian Penal Code very nearly comes up to the description of duress as here given.

Under the British Indian law, the distinction between a menace to the person or the goods of one of the contracting parties or a transferrer is not observed, and the term coercion is made to supply the place of the term, duress, in English law. Coercion is defined to be "the committing, or the threatening to commit, any act forbidden by the Indian Penal Code, or the lawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement."[5] It should be observed that under the Indian law as under the English, any contract entered into or transfer made under coercion is only voidable at the instance of the party coerced and not absolutely void, and upon the principles of equity the party at whose option the contract or the transfer is set aside is bound to restore to the other party any benefit which he may have derived from the transaction. *Guthrie* v. *Abul Mazaffur*, is a case in point.[6] There the plaintiff, Abul Muzaffar, sought to set aside a transfer on the ground that he had made the transfer under duress, and had been compelled to part with his

[1] *Ibid*, 645, 646.
[2] 11 A. and E., 990.
[3] See, *The Duke de Cadaval* v. *Collins*, 4 A. and E., 858; *Wilson* v. *Ray*, 10 A. and E., 82.
[4] Anson on Contract, 162 and 163.
[5] The Contract Act, s. 15.
[6] 7 B. L. R., 642.

proprietary rights to certain talooks at an inadequate price of 4,000 Rs. Their Lordships of the Privy Council are reported to have said that the contract having been complete, the plaintiff could only be relieved from its effects upon the terms of accounting for the 4,000 Rs. with interest. In other words, when a party wishes to avoid a contract on the ground of duress, the relief will be granted upon the principle that the parties should be restored as far as possible to their *status ante*. In this connection it is necessary also to consider the very important case of *Moung Showay* v. *Ko Byaw*.[1] Ko Byaw brought a suit to recover damages from the defendant for wrongfully causing his agent while under restraint to enter on behalf of the plaintiff into a contract by which plaintiff sustained considerable loss. By the contract in question, the agent was to buy from the defendant logs of timber at a very high price, and to give up to him some elephants and harness belonging to the plaintiff, a sum of money deposited by the plaintiff with a *binyakin* (an officer of the Siamese Government), who was alleged to be acting in the matter in collusion with the defendant, as payment of timber-duty, and a further sum of money which the plaintiff had advanced to certain foresters for timber which he was unable to utilize through being deprived of his elephants. The plaintiff claimed these two sums with interest, he also claimed a sum of money for the elephants and harness, and also a sum of money as hire for the elephants during the period of his dispossession. Sir M. E. Smith, in delivering the judgment of their Lordships, thus observed:—"No doubt, speaking generally, all matters relating to a contract are to be decided by the law of the country where the contract is made; but these are principles of universal application by which all contracts, wherever made, must be adjudged. The first principle of contract is, that there should be voluntary consent to it. In this country duress has always been held to avoid a contract, except in certain cases where the imprisonment is lawful. But this exception would not be held to apply to a case where a man is in custody upon a criminal charge like the present,[2] and has made an agreement to give a benefit to another to release him from that charge; in fact such a contract in this country would be held to be void on other grounds. Upon the face of it this charge shows that the man was charged with a criminal offence. Treephaw—that is the agent—requests not to raise contention with regard to having stolen, impressed, and struck with hammer-mark the logs of teak timber which has been cut, worked, and kept at the place allotted by M S A in the forest for which M. S. A. obtained the Imperial order and written permit. It was to get rid of that charge of having stolen these logs, when he (the agent) was in custody under the circumstances which have been referred to, that this

[1] I. L. R, 1 Cal, 330.

[2] Note that the agent when he entered into agreement with the defendant had been committed to prison at the instance of the latter by the *binyakin*.

agreement was made. Their Lordships, therefore, think that the plaintiff may repudiate it, as having been made by his agent when under duress. A question was raised, whether the agreement had not been confirmed and ratified by the subsequent acts of the plaintiff or his agent. No doubt if there had been a clear ratification, it being in the power of the plaintiff to ratify or reject it, if there were circumstances from which a ratification may be properly presumed, he would be bound by it. * * * The point is, that the timber was accepted by the plaintiff; but their Lordships think that it was not accepted under such circumstances as constitute a ratification, because, all the way through, the agent was protesting against this agreement, and so was the plaintiff, claiming the timber as his own property.[1] Then the question arises, whether a deduction should not be made from the amount of the decree for the value of the timber, which their Lordships are satisfied the plaintiff got into his possession. Undoubtedly if the timber belonged to the plaintiff, and the claim made by the defendant upon it was an invalid one, no deduction ought to be made from the damages, although possession of it may have been obtained in consequence of his agreement. This raises the question to whom the timber belonged when the agreement was made up." In the result their Lordships, having found upon the evidence that the logs of timber belonged at the time to the defendant, directed a deduction to be made from the decree to the extent of the value of the logs of timber.

Somewhat connected with the subject of duress is the subject of fraudulent conveyances which will more properly be dealt with hereafter.

There are certain persons, it should be noted, who on the grounds of policy are disqualified from contracting. In British India, the general rule is that all Covenanted Civil Servants are prohibited from lending or borrowing. Section 2 of the Regulation XXXVIII of 1793, runs thus: "The Judges and Magistrates of the Zillah Courts and their assistants, or other officers being Covenanted Servants of the Company, and the Collectors of the revenue and their assistants, are prohibited from lending money, directly or indirectly, to any proprietor or farmer of land, or dependent taluqdar, or under-farmer or raiyat, or their sureties, and all such loans are declared not recoverable in any Court of Judicature." Moreover, "Judges of Zillah Courts, all Magistrates, Joint-Magistrates, assistants to Magistrates, all Collectors and Deputy Collectors of the land revenue, all assistants to such Collectors or other officers, exercising the power of such Collector, are prohibited, under pain of dismissal from office, from borrowing money from, or in any way incurring debt to, any zemindar, taluqdar, raiyat or other person possessing real property, or residing in, or having a commercial establishment within, the city, district or division to which their authority may

[1] Note also, "that an agent who is in custody under a criminal charge has clearly no authority to part with his employer's property, or to make an agreement to part with it in order to relieve himself from such a charge."

extend."[1] It is clear from these provisions that whereas certain officers of Government may become debtors under the law, or in other words incur obligations that may be enforced in a Court of Justice, they cannot become creditors or enforce obligations as against others who may answer the description of persons mentioned in the Regulation.

Then, under the Bengal Tenancy Act,[2] at an auction sale in execution of a decree for arrears of rent due for a tenure or holding "the judgment-debtor shall not bid or purchase a tenure or holding so sold." And cl. 3 of the section provides that "when a judgment-debtor purchases by himself or through another person a tenure or holding so sold, the Court may, if it thinks fit, on the application of the decree-holder or any other person interested in the sale, by order set aside the sale."

The Transfer of Property Act provides that "no Judge, pleader, mukhtar, clerk, bailiff, or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his function."[3]

In conclusion, it may be well to add, in pursuance of what has already been premised, that persons, who on the ground of incapacity or imbecility of mind are placed under the protection of the State, stand in matters of contract and transfer on a somewhat different footing from persons who are not actually placed under that protection. Such persons are specially denominated "disqualified proprietors" under the British India Legislature. In Brahmanic law, it is said, "the property of a student and of an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy, shall have ceased.[4] "Equal care," it is also enacted, "must be taken of barren women, of women without kindred, or whose husbands are in distant places, of widows true to their lords, and of women afflicted with illness."[5] These powers correspond, in English law, with the royal prerogative of *Parens patriæ*.[6]

Under the Regulations and the Court of Wards Act in Bengal, "disqualified proprietors" are described as follows: "Proprietors of estates shall be held disqualified to manage their own property when they are, (*a*) females declared by the Court[7] incompetent to manage their own property; (*b*) persons

[1] Regulation VII of 1823.

[2] S. 173, cl. 2.

[3] Transfer of Property Act, s. 136.

[4] Manu, c. 8, v. 27.

[5] *Ibid*, v. 28.

[6] 3 Bl. Com., 426.

[7] "The Court" means the Court of Wards; or when the Court of Wards has delegated any of its powers to a Commissioner, Collector or any other person, it means, in respect of

declared by the Court to be minors; (*c*) persons adjudged by a competent Civil Court to be of unsound mind, and incapable of managing their affairs; (*d*) persons adjudged by a competent Civil Court to be otherwise rendered incapable by physical defects or infirmities of managing their own property." With reference to clause *d*, it may be mentioned that under the Roman law, spendthrifts (*prodigi*) were interdicted from the management of their property and disabled from making contracts that would impair their estate.[1] So, likewise, in Mussulman law, according to Shafei, a prodigal is interdicted from acting with his own property, as he expends his substance idly, and in a manner repugnant to the dictates of reason."[2] A prodigal is described to be one who in consequence of a levity of understanding acts merely from the impulse of the moment in opposition to the dictates of the Law and of common sense.[3]

The contractual capacity of a "disqualified proprietor" has been the subject of much discussion in the Courts. In *Jumoona Dassya* v. *Bamasunduri Dassya*,[4] Sir J. Colville in delivering the judgment of their Lordships of the Privy Council approved the observation of Mitter, J. in *Rajendra Narain Lahooree* v. *Sarada Sundari Dabee*,[5] and said that "the power to adopt or give an authority to that effect is allowed to a minor who has attained years of discretion under the Hindu law, although a minor or persons who are under the guardianship of the Court of Wards are prohibited to do either of these acts." In *Mohammed Zuhoor Ali Khan* v. *Thakooranee Rutta Kooer*,[6] it appeared to their Lordships on a consideration of the provisions of Regulation LII of 1808 that "the mere fact that the Court of Wards has charge of the estates of a female did not necessarily disqualify her from contracting debts; that Regulation should be construed strictly, the provisions requiring the Collector to report to the Board a female as disqualified, and the subsequent procedure thereon should be strictly carried out, as not mere matters of form, but necessary preliminaries before the female can be considered disqualified." The question was abundantly discussed by Field, J. in *Dhunput Singh* v. *Shoobhudra Kumari*.[7] There the plaintiff, Rai Dhunput Singh sued Rani Shoobhudra Kumari, a lady whose estate was under the management of the Court of Wards, and he sought to recover a sum of money,

such powers, the Commissioner or Collector or person to whom they are delegated." Act IX (B. C.) of 1879, s. 3.

[1] D. 50, 17, 40. Hunter's Roman Law, 428.

[2] Hidáyá, 526.

[3] *Ibid.*

[4] I. L. R. 1 Cal., 295.

[5] 15 W. R., 548.

[6] 11 M. I. A., 478.

[7] I. L. R. 8 Cal., 620.

being principal and interest due upon a bond which was found to have been executed by the Rani. He also sought to have certain property declared liable to be sold in execution for the realization of the amount claimed by him. The material issue in the case was whether the Rani had been duly constituted a Ward of Court, and if so, whether that circumstance absolutely incapacitated her from entering into any contract, or simply rendered her incapable of contracting to the extent that she could not bind her property or any portion of that property which came under the management of the Court of Wards. Field, J. said:—"It is to be observed that no express provision is to be found upon this point either in Reg. X of 1793 or Reg. LII of 1793, or in any of the Acts by which these Regulations were amended, nor yet in the consolidated Bengal Act IV of 1870. The last Court of Wards Act (Bengal Act, IX of 1879) does contain in s. 60 the following express provision: "No ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in his prope or any part thereof." It is to be observed that if the proper construction placed upon the old Regulations or the Act of 1870 were this, that a w Court is absolutely incapable of contracting, the provision contained in s. Bengal Act, IX of 1879 would have been unnecessary. Considerable relia placed upon the case of *Mahmud Zahur Ali Khan* v. *Thacooranee Rutta Koer.* true that in that case the bond was a simple money bond, and it is also true tha of the questions presented for decision to their Lordships of the Privy Counci the wide question—Had the defendant the power to contract debts? An their Lordships point out in their judgment, not the more limited questi Whether she had power by contract to charge her land with debts? Ha stated the questions which were in dispute in that particular litigation, Lordships proceed to say: "Under these circumstances, the principal que to be considered on this appeal are, whether the estate and property of R Koer were in fact under the charge of the Court of Wards when the bon alleged to have been executed; and if so, whether such custody or charge was character which made her what is called a disqualified female, and incapacit her to contract debt in any way." Their Lordships found that the estate property of Rutta Koer were in fact under the charge of the Court of Wa when the bond was alleged to have been executed. They further found t this custody or charge was not of a character which made her a ward of t Court; but they did not proceed to decide whether, if the provisions of t Regulation had been properly applied to Rutta Koer so as to make her a w of the Court, this would have incapacitated her to contract debt in any way, would merely have incapacitated her to contract debt so as to bind the prope which came under the management of the Court of Wards. * * * Sect 11 of the Indian Contract Act provides, that "every person is competent contract who is of the age of majority according to the law to which he

subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Now the mortgage bond which forms the subject of the present suit, was executed after the Contract Act came into force; and the Rani was without question of the age of majority at the time. We have already observed that there is no express provision to be found in any of the Regulations or Acts prior to 1879 which disqualifies a ward of the Court from contracting, and this being so, we think that if capacity to contract existed apart from the provision of the Regulations and Acts applicable to the Court of Wards, such capacity cannot be presumed to be taken away by anything contained in any of the Regulations or Acts prior to 1879, unless we can find that this result follows by necessary implication from a reasonable construction of these enactments. * * * * We think, therefore, that the reasonable construction to be placed upon the whole of the Regulation[1] read together is, that, so s regards the property which by the Regulation came under the charge of the ger and the contract of the Court of Wards, the ward became incapable tracting. This is a view which we think to be consonant with the whole provisions of the Regulation read together, and which is furthered by some rity.[2] Section 60 of the present Court of Wards Act[3] therefore merely in express language what, in our opinion, is the result of a reasonable uction of the old Regulation. * * * The conclusion which we arrive that a ward of Court, duly constituted as such, is not thereby absolutely acitated from contracting, but that the power of the ward is taken away so s regards all property which, under the provision of the law, comes under harge or control of the Court of Wards." The effect of this judgment, it be observed, clearly is that the contracts of "disqualified proprietors" are utely void with respect to property which may happen to come under the t of Wards; but it may yet be submitted that in the case of a *bonâ fide* hase for value without notice, the contract or transfer, if a nullity, should onsidered as subject to all the equities of the particular case.

[1] Reg. X of 1793.

[2] See, *Kustoora Koomaree* v. *Monohur Deo.* W. R. January to July, 1864, 39.

[3] Bengal Act, IX of 1879.

LECTURE VIII.

THE POWER OF TRANSFER:

WHO MAY TRANSFER.

Transfer without ownership—The *dictum* of Káttyáyann—The *dictum* of Pomponius—Intransferable and Nontransferable rights—The chance of an heir-apparent succeeding to an estate—The Transfer of Property Act, s. 6—Heir of a family dealing with expectancy—Principles of English law—*Berney* v. *Pitt*—*Nott* v. *Johnson*—*William* v. *Beake*—*Burnerdiston* v. *Lingood*—*Gowland* v. *De Faria*—Reversionary Rights—*Evans* v. *Peacock*—*Carleton* v. *Leighton*—*Nichols* v. *Gould*—*Taffazul Hossuin* v. *Raghunath Pershad*—Reversioners under the Hindu law, classified—*Ryechurn Pal* v. *Pearimoni Dasi*—Hindu Widow's or Mother's share on partition—*Sabramania Mudaliar's* case—Bhagavati Devi's case—*Smith* v. *Packhurst*—A mere right of re-entry, how transferable—*Hunt* v. *Bishop*—Right of easement, transferability of—*Collins* v. *Slade*—Chunder Cumar Mookerjie's case—An interest in property restricted in its enjoyment to the owner personally cannot be transferred—*Shee* v. *Hall*—*Hatton* v. *May*—Rights of shebait, nature of—Juggernath Roy's case—Kalee Churn Geer's case—Ukoor Das's case—*Drobo Misser* v. *Srinibas Misser*—Hindu Widow's right to maintenance, not transferable—Salary of a public officer, not transferable—*Wells* v. *Foster*—*Flarty* v. *Odlum*—*Non dat qui non habet*, principle of—*Nemo plus juris ad alienum transferre potest, quam ipse haberet*, explained—No transfer can be made in so far as it is opposed to the nature of the interest affected thereby—*Rennie* v. *Gungu Narain Chowdhry*—Persons authorized to transfer—Guardian, his power of transfer—Roman law—Tutor—*Tutela testamentaria*—*Legitima tutela*—Curator—[illegible] law of guardianship followed in Modern Europe—Les Codes Civils 'Etrangers—[illegible] law—Lord Chancellor's power to appoint guardians—British Indian law—The di[illegible] kinds of guardians, their power—Hanuman Persad Panday's case—Act XL of [illegible] Sikher Chand's case—The Court of Wards as guardian—Sarbjit Singh's case—The ma[illegible] of a lunatic's estate, power of—The power of a Hindu managing coparcener—Dee[illegible] Lal's case—Sadabart Persad Sahu's case—Father and son in Mitácshara law, the id[illegible] of—The *dictum* of Yájnavalkya—Suraj Bansi Koonwar's case—Distinction be[illegible] transfer by act of party and that by act of law—Hindu widow's power of transfer—[illegible] Reversioner, his position—Jadumani Dévi's case—*Cassinath Bysak* v. *Hurósundari* [illegible] Naffer Das Roy's case—*Gobindomoni Dassi* v. *Shamlall Bysak*—Shebaits and Mutw[illegible] their power—Koonwar Durganath Roy's case—*Prosunno Kumari Debya* v. *Golap C*[illegible] *Babu*—Wuqf, meaning of—*Sajjada Nashin*—The different kinds of dedication deeds k[illegible] in British India—Wilson, J., his classification—Executor and Administrator, their pow[illegible] Indian Succession Act—Probate and Administrative Act—Official Assignee, his pow[illegible] Receiver, his power—Agent, the power of—The Power of Attorney Act—*Reynell* v. [illegible] —Pollock, C. B., his observation—Transfer of Property Act, s. 7.

अस्वामिविक्रयं दानमाधिं वा विनिवर्तयेत्, is the dictum of Káttyáyana.[1] In o[illegible] words: sale, gift, or pledge without ownership is no sale, gift or pledge at [illegible]

[1] Viramitrodaya, Vyávaháramayukha.

The same idea is thus expressed by Pomponius[1]:—"*Id quod nostrum est, sine facto nostro ad alium transferri non potest*," or, that which is our own cannot be transferred to another without our own act.

One that does not possess a right or a thing has of course nothing to give or to transfer. Plain as this proposition may appear to be, it, nevertheless, stands in need of some explanation. For, it does by no means follow that every right is transferable, or that every person that possesses a right can transfer it. Nor is it true in every case that the person who is not the owner of a thing necessarily lacks the power to transfer the thing.

The chance of an heir-apparent succeeding to an estate or any other possibility of a like nature, cannot, in the words of the Transfer of Property Act, be transferred.[2] The principle upon which this enactment is founded has been amply discussed in the English Courts, and transactions with expectant heirs and reversioners are discountenanced on the ground of unconscionableness. The heir of a family dealing for an expectancy in that family, as observed by LORD THURLOW,[3] shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle and therefore repressed. In *Berney* v. *Pitt*,[4] the plaintiff being a young man, as he alleged, and his father tenant-for-life only of a great estate, which by his death was to come to the plaintiff-in-tail, and during his life allowing the plaintiff but a narrow allowance, he became indebted, and borrowed 2000*l* of the defendant ntered into two judgments of 5000*l* apiece, defeasanced each of them, if plaintiff outlived his father, and within a month after his father's death, the defendant 5000*l*., and if the plaintiff should marry in the lifetime of father, then if he should from such marriage during his father's life pay efendant interest for his 5000*l*., the defendant should vacate the judgment; this further clause in the defeasance, that it was the intent of the parties, e plaintiff did not outlive his father, that the money should not be repaid. plaintiff's father having died, to be relieved against the said judgments payment of the 2000*l*. lent with interest was the Bill which complained e fraud and a working of the plaintiff's necessity when in straits. The came on for hearing before Lord Chancellor Jeffries, and it was insisted that ere was no true differ in the case of an unconscionable bargain, whether e for money or for wares; and that the inserting the clause in the defeasance

[1] D. 50, 17, 11. *De Diversis Regulis Juris Antiqui.*

[2] The Transfer of Property Act, s. 6. Note the remark of the Law Commissioners on the ion:—"The section should to some extent follow the analogy of the Code of Civil Proce- as to property which may be attached."

[3] 1 Bro. C. c. 10.

[4] 2 Vern 14.

that the defendant should lose his money if the plaintiff died before his father, did not differ the case in reason at all from any other bargain made by the plaintiff or other tenant-in-tail, to be paid for at their father's death, for that in these cases, if the tenant-in-tail died leaving the father, the debt would be lost of course, and therefore the expressing of it particularly in the defeasance made the bargain the worse, as being done to colour a bargain that appeared to the defendant himself unconscionable." Though there was not in this case any proof of any practice used by the defendant or any on his behalf to draw the plaintiff into his security, yet in respect merely to the unconscionableness of the bargain, the LORD CHANCELLOR annulled the transaction and "did decree the defendant to refund to the plaintiff all the money he had received of him except the 2000*l.* originally lent, and the interest for the same."

In *Nott* v. *Johnson*,[1] the plaintiff being entitled to an estate-tail, after the death of his father, in lands, which if in possession were worth to be sold about 800*l.*, and being cut off by his father, and destitute of all means of livelihood, did for 30*l.* paid and 20*l.* per annum, secured to be paid to him during the joint lives of him and his father, absolutely convey his remainder-in-tail to the defendant's father and his heir. On the death of the father the plaintiff brought his bill to be relieved against this conveyance, charging that it was intended only as a security, and though there was no proof to that purpose and the deed absolute, and though the defendant would have lost all, if the plaintiff had died in his father's lifetime, yet upon the first hearing of the cause LORD NOTTINGHAM decreed a redemption. LORD JEFFRIES upon a rehearing agreed with LORD NOTTINGHAM, declaring that he took it to be an unrighteous bargain in the beginning.

In *Williams* v. *Beake*,[2] the plaintiff had entered into several statutes of great penalties to the defendant's testator defeasanced for payment of *ten* to *one*, upon the death of his uncle, who was only tenant-for-life, of a considerable real estate, remainder to his first and other sons in-tail, remainder to the plaintiff in case the uncle died without issue male, and the plaintiff survived him. The plaintiff's uncle dying some years since without issue, the Bill was to be relieved against this bargain, and to have up the securities on payment of what was really due with interest. For the defendants it was insisted, that this was not the ordinary case of surprising a young heir into a hard bargain: but the plaintiff was above thirty, near forty years old, when this bargain was made, had been a man in employment, to wit, a Proctor at Doctor's Commons, and of experience in the world: and besides, the defendant's testator, several years after his bargain made, understanding that the Chancery began to relieve against such bargains, came to advise with his counsel what was fit to be done in the case, and thereupon a bill was exhibited by the testator against the present plaintiff to compel him

[1] 2 Vern, 27. [2] 2 Vern, 121.

either to repay the money with interest or to be foreclosed of any relief against this bargain, and that in answer thereunto in the lifetime of his uncle, he elected to stand to the bargain, and that it was fairly and duly made, and that he would not seek any relief against the same, and therefore ought not now to be relieved against his own election and vote. The Court there observed:—"When the plaintiff had spent the money, then a specious offer was made to relinquish the bargain in payment of the money lent with interest which at that time it was impossible for him to do, and though such Bill was exhibited, it was not prosecuted, but was a contrivance only to double hatch the cheat, and therefore it was fit to relieve the plaintiff on payment of principal and interest only without costs."

In *Burnerdiston* v. *Lingood*,[1] the plaintiff being distressed in his circumstances conveyed his remainder-in-tail in certain manors of the yearly value of 300*l.* expectant upon an estate for life in his uncle for the sum of 300*l.* only to the defendant, his heirs and assigns forever, from and after the decease of the uncle without issue male; upon a bill to set aside the transaction, Lord Hardwicke observed: "There are all the material ingredients in this case to set aside this agreement as a catching bargain against a necessitous and improvident heir. What the Court is guided by in all these cases is, the taking an undue advantage of an heir being in distressed and necessitous circumstances, and this is the principal ground. There is no more than three hundred pounds given for an estate of three hundred pounds a year, which is but one year's purchase of a reversion that was to fall in upon the death of a person who was turned of fifty, and not likely to marry, so that the hazard the contracting party ran was very small. Can this be said to be a fair way of purchasing estates, to furnish a young heir with money from hand to mouth, and barely enough to buy him necessaries in the lifetime of his ancestor. As to the hazard which the purchaser ran, I have said before that this Court has always extended its relief in such cases, and with the greatest justice in the world, for the sake of the public, to prevent people's gaining, as it were, to the prejudice and damage of young improvident persons, and the heir to families." Consequently, the transaction was set aside, the plaintiff being ordered to return to the defendent the principal and interest.

In *Gowland* v. *De Faria*,[2] the bill stated that the plaintiff being in great distress and difficulties, and inexperienced in legal affairs; and being entitled to the reversion of a considerable estate in fee simple after the death of his mother, then aged fifty-seven, proposed to raise money by way of annuity, and was introduced to the defendant De Faria who being aware of the plaintiff's difficulties and inexperience, took advantage thereof, and for the inadequate consideration of 1,500*l.* induced and persuaded the plaintiff to grant him an annuity of

[1] 2 Atk., 134.

[2] 17 Ves., 20.

200*l.*, for the term of nine hundred and ninety-nine years from the decease of the plaintiff's mother; which sum was paid to the plaintiff who executed a bond and warrant of attorney to confess judgment, with condition for the payment of the annuity, and by indentures of the same date, the reversion was devised for two thousand years to a trustee for securing the annuity with a covenant by the plaintiff to deliver up the title deeds upon the death of his mother. Upon the death of the mother, the bill was filed charging that the defendant took advantage of the plaintiff's distress and inexperience, to compel him to give unreasonable and excessive securities; praying that the securities may be delivered up to be cancelled, and offering to repay the money advanced with interest. The defendant, by his answer, representing that the plaintiff voluntarily and without solicitation by the defendant offered to sell the annuities proposing to bind him personally, stated the defendant's belief that everything was read over to the plaintiff, that the covenants for the delivery of the title-deeds were introduced with his privity, and submitted that the plaintiff received a full and adequate consideration, his mother being then in a good state of health likely to live long and having lived many years. Upon this state of facts, Grant, M. R. observed:—"In considering the case of *Evans* v. *Peacock*, I found the doctrine of the Court perfectly established, that it is incumbent upon those who have dealt with an expectant heir relative to his reversionary interest to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. That is undoubtedly a heavy burden imposed upon a purchaser; but in that particular case, the burden is imposed upon him, and that case is an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In all those cases the issue is upon the inadequacy of the price. This is the case of a person, who in this Court is considered as an expectant heir. He has charged his reversionary interest, and the question is whether he has received an adequate consideration." And the transaction was annulled, the plaintiff being directed to repay money advanced with interest.

It would appear from the judgment in *Evans* v. *Peacock*,[1] which is undoubtedly one of the leading cases on the point, and where Sir William Grant cites the dictum of Lord Thurlow and Lord Eldon, that the position of reversioners and the like in dealing with their future estate is that of an infant against the effects of his own conduct, and that a *bonâ fide* sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not, unless fraud or imposition be expressly proved or be implied from the inadequacy of the consideration or other circumstances attending the sale. The purchaser in such cases is considered as a sort of mortgagee, and relief is generally given to the vendor on payment by him of principal, interest and costs.

[1] 16 Ves. Jr., 512.

The judgment in *Nichols* v. *Gould*[1] of Lord Hardwicke is highly instructive. There the plaintiff was a poor dragoon, entitled to a reversion in fee of a small estate after the death of a tenant for life, to whose first and every other son there was a remainder, but who then had no son nor was married. Defendant purchased this reversion. The tenant for life having died in about a month after, the bill was to set aside the conveyance as being at an under-value. The Lord Chancellor observed :—" There is no proof of any fraud or imposition on the plaintiff ; nothing but suspicion, and therefore it is too much to set aside this purchase merely on the value. Every purchase of this kind must be on the foot of great uncertainty as to the value. The first of this kind which may be purchased is a reversion after an estate tail; which the law does not consider of any value; and yet by accident it may be a most valuable thing, and will take place in possession if tenant in tail dies without suffering a recovery. * * The next interest to that is the purchase of a reversion after an estate for life with contingent remainders to the children of tenant for life, which is a better reversion than the other. * * * But still this is liable to uncertainty and difficulty in computation as to the value, which depends on such a number of chances; as whether tenant for life is healthy and likely to have children (in which case the reversion would be worth but little) that it is impossible to compute it. * * * * If indeed there was any degree of fraud or imposition, the Court would come at it and set it aside; but there is not. The plaintiff was in the best situation to see the value, not being at a distance from the estate or from the tenant for life and his family. Looking at the event it was purchased at an undervalue; but had he lived longer and had children, it had been different. It is asked where is the harm, because the defendant will have his money again ? but I cannot set it aside without making him pay costs: and that argument may be made use of in every advantageous purchase, that he might have his principal and interest again ; some weight is to be laid on the behaviour of the plaintiff, who seems satisfied and did not complain of it until after the death of the tenant for life without issue ; which if it had not been the case, I never should have had this suit, and yet there would be just the same ground, if the tenant for life was still alive. These kind of purchases are a sort of chance; it is too hard to come at it, unless there was any proof of fraud or imposition which then the Court would lay hold of." In the event, the Bill was dismissed.

It will be observed that the chance of an heir-apparent succeeding to an estate or any other possibility of a like nature has under the Transfer of Property been placed on its own footing, and is clearly separated from the cases of reversioners and remainders as set forth in the English decisions. Such

[1] 2 Ves. Sen , 42.

an interest, if any, cannot at all be transferred. In other words, the transfer of such an interest must be deemed to be wholly void. It would, indeed, appear from the words of the section that such an interest is regarded as no interest at all as being wholly dependent upon the will of a third person, or at best a speculative interest. The case of *Carleton* v. *Leighton*,[1] is illustrative of the point. There the plaintiff by his bill claimed certain real estates in the defendant's possession, to which the plaintiff alleged himself entitled as heir-at-law, and the case was that the plaintiff's alleged ancestors by their respective wills had devised them to Leighton. These devises were shown to be void. To this there was put in a plea in bar, stating that the plaintiff had no right or interest in the estates in question, for that before the date of either of the wills, a commission of bankruptcy was duly issued against the plaintiff, under which he was afterwards duly found and declared a bankrupt, and all his estate and effects were thereupon duly transferred and assigned to a particular person; and therefore the possibility which the plaintiff had as heir-at-law of the testatrixes also passed by the bargain and sale of the commissioners, leaving him without any right or interest whatever. LORD ELDON there held that the expectancy of an heir-presumptive or apparent (the fee simple being in the ancestor) was not an interest or a possibility, nor was capable of being made the subject of assignment or contract, and therefore that no interest in the estates in question passed under the bargain and sale of the commissioners.

In *Tuffazul Hossein* v. *Raghunath Prasad*,[2] it was observed, that a mere expectancy could not be attached in execution of a decree.

Somewhat similar to the chance of an heir-apparent succeeding to an estate is the right of the reversioner under the "Hindu" law. It should be clearly understood that there are three sorts of reversioners under the Hindu law: (*a*) the reversioner who or whose heirs will succeed on the death of the widow, and take the estate absolutely; for instance, a brother or a nephew; (*b*) a female reversioner, such as the daughter of the deceased proprietor who can take only a limited interest on the death of the widow; (*c*) the reversioner, who if he survive the widow or the daughter will take the estate absolutely; but whose personal heirs have no right to the estate, such as the daughter's son. The succession of any of these reversioners does by no means depend upon the will of the person, such as the widow, daughter or mother, who may happen to be in actual possession of the estate.

The expectant interest of Hindu reversioners has been held to be transferable. In *Rye Churn Pal* v. *Peary Monee Dassee*,[3] the defendant was a childless

[1] 3 Merivale's Rep, 671.
[2] 7 B. L R, (P. C), 195.
[3] 1 Marshall's Rep, 622.

widow possessed of a life-estate in the property of her deceased husband. One J. C. being entitled to the reversion of the property expectant on the determination of the widow's life-estate, sold his interest to the plaintiff. After the assignment, the plaintiff instituted a suit in his own name against the widow and one H to set aside a decree in favour of the latter in a suit collusively instituted by him against the widow for the purpose of defrauding the reversioner, and restrain the defendants from committing waste. The Court (Raikes and Pundit, JJ.), observed :—" The point raised in appeal has been the legal incompetency of the plaintiff to sustain a suit of this nature, upon the ground of having purchased the rights and interests of the present reversioner. We see nothing so peculiar in the position of a Hindu reversioner that he should be excluded from disposing of his contingent interest if he pleases. It is true that the reversioner of to-day may not eventually prove to be the heir who succeeds to the property ta the death of a Hindu widow; but that is a risk which the purchaser has to encounter and cannot invalidate his purchase. Neither can such purchase deprive the nearest relations of the deceased husband of the exercise of that free agency which under the Hindu law they possess, as the sanctioning the acts of the widow in dealing with her husband's property to the extent permitted by the Hindu law—all these matters constitute the risks which a purchaser incurs; but this was for him to consider and not for the court. If then the reversiner can sell and thereby place another in his position, we see no reason why the latter should not have the same means of protecting the interests devolving upon him, as the actual reversioner admittedly possesses while he retains his rights. The right of a reversioner to restrain the defendant from committing waste is not confined to Hindu reversioners, but is a right, it appears to us, common to all who have such interests to protect. It is not, therefore, only because the Hindu law restores the property to the husband's heirs, after the widow has enjoyed it during her life, that the courts entertain actions of this kind; nor because the husband's heir has the right to receive the property uninjured and unincumbered from unjustified acts of the widow, that in protection of his own dormant rights he is allowed to restrain her. It is, therefore, we believe upon general principles of equity common to all cases of this description, and not upon any special provision of Hindu law, that actions to prevent waste are allowed in our courts. In the application, therefore, of these principles we hold that the plaintiff who stood in the place of the reversioner is entitled to maintain an action founded on waste having been committed by the widow."

It should be noticed that the question, whether a Hindu widow's or rather mother's share on partition can be transferred, stands upon a somewhat peculiar basis. The mother of a family cannot of her own accord call for partition of the estate of her deceased husband. If she be the mother of only one son, she has no right to any share in the estate. It is in the event of there being several sons that

the mother can expect to have a definite share. Partition, it must be understood, is dependent on the will of a son or sons, and the effect of the exercise of that will is the allotment to the mother of a share in the estate equal to that of a son in lieu of maintenance. Her expectant right in her late husband's estate may well be described in the words of West, J.[1] as "an inchoate right to a share on partition should there be a partition." The wife's right to maintenance as against her husband is of a nature that has been held to be untransferable. It has been said to be "a latent right coming into operation only when natural affection, which usually prompts the mutual acts of members of families, fails of its proper effect, and the law has to step in with its rigid rules and imperfect remedies. Unless she be deserted or the family be divided the wife is strictly dependant as to her so-called property. In this event a right to a share of the estate springs up, but till then she has only a right which is completely subordinate. It is not one that she can transfer by her own individual act. The husband's duty of maintaining his wife is one which he cannot owe to another. Her right as against him is one that she cannot transfer to another."[2]

In *Subraminia Mudaliar's* case,[3] it was said that during the marriage and the life of the husband, the claim to maintenance against his estate was a mere possibility. If he had wrongly put her away or refused to support her, the possibility would have become a present interest. The right is a charge on the husband's estate in some circumstances while he still lives,—in all cases, when he lives no longer." The principle laid down here was extended to the case of widow's right of maintenance in *Kalpagathachi* v. *Ganapathi Pillai*.[4] There, Turner, C. J., thus explains the nature of a widow's right of maintenance :—"She is entitled to sustenance according to the means of the family. She is competent to have her claim made a specific charge on a particular property, but so long as it has not been reduced to certainty by a legal transaction, she has a mere equity to a provision. We hold that this constitutes no interest, vested or contingent, in the immoveable property within the meaning of the Registration Act." One should note that, in the words of Phear, J., in Bhagavati Dassi's case,[5] such a right "has no definite existence," and therefore can hardly be called a proprietary right.

A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.[6] It should be observed that a lease for years generally contains a proviso for re-entry for non-payment of rent to protect the lessor from being saddled with an im pecunious tenant, and enable the lessor to get rid of him.[7] It was said in *Hunt* v.

[1] I. L. R., 5 Bom., 104.

[2] Narbada Bai's case, I. L. R., 5 Bom., 103.

[3] 7 M. H. C. R., 226.

[4] I. L. R., 3 Mad., 191

[5] 8 B. L. R., 225.

[6] The Transfer of Property Act, s. 6, cl. *b*.

[7] 8 Q. B. 973. See, Woodfall's Landlord and Tenant

Bishop,[1] that if the claimant be not the lessor, his title to the reversion must be deduced and proved by the production of proper conveyances of the reversion; and where a forfeiture is relied on, it must appear that the reversion was assigned to, and become vested in, the claimant before such forfeiture. In substance, a mere right to eject cannot be separated from the ownership of the property in respect of which ejectment is sought, and Lord Chief Justice Willes is reported to have remarked in *Smith* v. *Packhurst*,[2] that "a right of entry supposes an estate, for what is a right of entry without a right to hold and receive the profits; therefore I have always thought that if an estate is granted to a man receiving rent, and in default of payment, a right of entry was granted to a stranger, it was void."

A right, such as that of easement, cannot be transferred apart from the dominant heritage.[3] An easement, it is said, cannot be in gross in English law, or, in other words, no one can be said to enjoy an easement apart from the possession of some tenement. In the language of text writers,[4] an easement as such can only be claimed as accessory to a tenement. The definition of an easement in the French Code runs thus:—un charge imposée sur un héritage pour l' usage et l' utilité d'un héritage appartenant à une autre personne.[5] It follows necessarily from these definitions that an easement is inseparably connected with the ownership of a particular piece of land or like property, and that being so, the rule laid down in the Transfer of Property Act becomes almost self-evident. In a very early case referred to by Mr. Gale,[6] where the owner of a piece of land granted to another a way over it in order to proceed to a certain mill of which, however, he was not seised, it was observed that the grantee could not enforce the right of way, inasmuch as "he had not the frank tenement to which he claimed to have the way." And the judgment also went the length of deciding that even the purchase of the frank tenement afterwards would not enable him to maintain the action. In order to constitute an easement, it should be observed, there must be two tenements, a dominiant one to which the right belongs, and a servient one on which the obligation is imposed.[7] It must, therefore, be evident that to allow the separate transfer of easements would be to impose additional and unreasable burdens on the servient tenement such as might not only encompass its destruction, but render

[1] 8 Exch., 675, 680.

[2] 3 Atk., 139.

[3] The Transfer of Property Act s. 6 (*c*).

[4] See, Gale on Easements.

[5] "A charge imposed on a heritage for the use and convenience of a heritage belonging to another person."

[6] 21 Edw. 3, 2, pl. 5.

[7] Gale on Easements, 5.

the burdens intolerable to the owners of such tenement. Thus, where there was a grant of drainage to a private mansion house and grounds, which was then adapted for about twenty-five inmates, and the grantee afterwards altered the drains and enlarged the house, and converted it into a lunatic asylum in which nearly 150 persons lived, and sent all their drainage to the servient tenement, an injunction was granted.[1] Such a case differs little in principle from one in which the owner of a tenement commanding the right to send all its drainage to a servient tenement happens to grant the right of using the drain which passes through his house along the servient tenement to the owners of neighbouring lands. In *Collins* v. *Slade*,[2] where by lease a right of way was granted to a manufactory, and it was afterwards turned into a place of public entertainment, Bacon, V. C., held that the parties had no right to enlarge the right of way over the passage beyond the extent of user at the date of the lease. In Chunder Cumar Mookerjee's case,[3] Wilson, J. observes that one who has a right of passage must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their right, because that which might be no nuisance if done by one may become a serious nuisance if done by many.

"An interest in property restricted in its enjoyment," in the language of the Transfer of Property Act,"[4] to the owner personally cannot be transferred by him." Note the argument in *Brandon* v. *Robinson*[5] which was to this effect that "the proposition that a testator may limit a personal benefit strictly, either by actual assignment or operation of law, cannot be disputed. It must, however, in such cases clearly appear that the intention of the grantor was to restrict the enjoyment of the property to a specified person. In *Shee* v. *Hale*,[6] a testator by his will gave and bequeathed all the residue of his real and personal estate to trustees, upon trust to pay to his son a yearly sum clear of all deductions, during the term of his natural life, or until such time as his said son should actually sign any instrument, whereby or in which he should contract or agree to sell, assign or otherwise part with, the same or any part thereof, or in any way charge the same, or any part thereof, as a security for any sum or sums of money, to be advanced or lent to him by any person or persons whomsoever, or in any other manner whatever charge or dispose of such annuity, or any part thereof by anticipation, or whereby or in which he should authorize or empower, or intend to authorize or empower any person or persons whomsoever to receive such annuity or any part thereof except only as to the then quarterly payment, after such authority or power should be given, and he declared his will to be

[1] L. R. 10 Ch., 582.
[2] 9 W. N. 205.
[3] I. L. R. 7 Cal, 665.
[4] S. 6, (*d*).
[5] 18 Ves., 429.
[6] 13 Ves., 404.

that in case his said son should at any time sign or execute any such instrument or writing for the purposes or any of the purposes aforesaid, then and from thenceforth the same and every part thereof should cease to be paid or payable to him and should sink into the general residue of his personal estate. By a codicil the testator bequeathed the residue of his estate and effects to the same trustees upon trust to pay the interest and produce thereof unto his wife during her life, and after her decease directed them to transfer such residuary personal estate to other persons. There, Sir W. Grant, M. R. held that as the intention of the testator to make the annuity personal to his son could not be doubted, upon the son taking the benefit of the Insolvent Act, the condition on which he took the annuity was broken, and the assignees took nothing. In the recent case of *Hatton* v. *May*,[1] a testator by his will directed the trustees to purchase some annuities for his three daughters "for their sole and separate benefit and disposal as the same shall be from time to time payable, independently and exclusively of and so as not to be subject to the control, debts or engagements of any husband any of them may marry, and if any of the said annuitants shall at any time sell, alien, assign, transfer, incumber or in any wise dispose of, or anticipate the said respective annuities, or any part thereof, then and in such cases respectively, and immediately thereupon, the same annuity to such annuitant shall cease determine and be void, and shall sink into and become part of the residue of my personal estate and effects." Malins, V. C. was there of opinion that the annuities were intended for the personal benefit of the daughters, and therefore the condition with regard to inalienability was enforceable. We shall revert to these questions hereafter when we come to deal with the subject of conditions.

Under the head of personal rights may be classed the right of a *shebait* to perform the services of an idol; and it may be presumed from the decisions, which, however, for the most part are found to deal with cases of involuntary alienation, that such a right cannot be transferred at all, and the question may also arise as to what will happen to such right in the event of the *shebait* changing his religion.

In *Juggurnath Ray* v. *Kishen Pershad Sarmah*,[2] Macpherson, J. was of opinion that the right to perform the services of an idol could not be sold. "Such a sale," the judgment proceeded, "would practically destroy the endowment, or have the effect of defeating the whole object of its creation; there would be no guarantee that the services would be properly kept up: for the purchaser, whoever he might be—even if a Mohamedan or a Christian—would have the right of performing the worship of this Hindu idol."

In *Kalee Churn Gir* v. *Bungshee Mohan Dass*,[3] Mookerjee, J. observed:—"It

[1] L. R. 3 Ch. D. 151 and 152. [2] 7 W. R., 266. [3] 15 W. R., 339.

is said that the Moonsiff then proceeded to order that certain *pullahs* or rights of service in the judgment-debtor ought to be sold. We do not see how rights of worship of a Hindu idol can be sold by a Court to the highest bidder in execution of a decree for the personal debt of a *shebait*. It has been held all along that such a right of service or *pullah* (*i. e.* turu of worship) cannot be sold, for it may happen that the purchaser of the rights of the *sheba* (*i. e.* worship) may be of a different religion, and may not be disposed to perform the services; one object of the endower in creating the endowment may thus be defeated and rendered null and void."

In *Ukoor Doss's* case,[1] it was said that "the idol being the joint property of the members of the family of the endower, they alone are entitled to their turn of worship, and to manage the affairs of the endowment. It is the essence of a family endowment amongst the Hindus, that no stranger shall be permitted to intrude himself in the management of the endowment. The deed assigning the rights of one member might be said to be valid during his life time, but such right could not be transferred to a third party, so as to enure beyond the life of him." You will observe that it is somewhat difficult to explain the full meaning of this decision. However, it is perfectly clear that the right of service is in its nature strictly personal and therefore inalienable. The observations in *Drobo Misser* v. *Srinibas Misser*[2] are likewise illustrative of the point. "The *sebait* of a Hindu idol," it was there said, "has to perform services for the idol, that is to say, to perform the worship of the idol and to prepare food for it, and such a right is not transferable and cannot be sold at a public auction in execution of a decree."

Upon analogous principle, it has been repeatedly held that a Hindu widow's right to maintenance is not transferable. In *Bhoyrub Chunder Ghose* v. *Nabo Chunder Guho*,[3] the Court was of opinion that the right of maintenance which a Hindu widow has out of lands which belonged to her husband, and have devolved on her son is a personal right and cannot be transferred to another. The *ratio decidendi*, however, in that case seems to have been that although the widow may be entitled to maintenance out of the lands in question, she has "no right, title or interest in the lands which can be sold in execution of a decree against her." One might, therefore, conclude that when such maintenance is ascertained and defined it may form the subject of transfer. But arrears of maintenance already accrued due have been held to be alienable.[4] That the right

[1] 3 W. R., 152.

[2] 14 W. R., 409.

[3] 5 W. R., 112.

[4] *Kasheeshuree Debia* v. *Grish Chunder Lahooroe*, 6 W. R. Misc. 64, *Grish Chunder Lahoore* v. *Kashisauri Debi*, I. L. R. 13 Cal., 145.

to future maintenance cannot be attached in execution of a decree has now been expressly laid down by the Civil Procedure Code;[1] but whether such a right can be transferred by act of parties is still an open question. The precise nature of a Hindu widow's right to maintenance, as was said in Lachman Ramchandra Joshi's case[2] has given rise to a diversity of views. From *Bhagabati Dasi* v. *Kanailal Mitter*,[3] it appears that the wife's or widow's right of maintenance is of an inchoate nature, and cannot be regarded as an already existing proprietary right or as containing all the elements necessary for its ripening into a specific charge on the property. In Lachman Ramchandra Joshi's case,[4] West, J. was of opinion that the wife's or the widow's right of maintenance did contain all the elements necessary for its ripening into a specific charge; but, nevertheless, it was said that it could not be called "an already existing proprietary right." In Lalljeet Singh's case,[5] it was observed that the mother under the Mitakshara law was a necessary party to a suit for partition by the sons against their father. If, however, the Hindu widow's right to maintenance is a charge on the inheritance, it is not easy to understand why such a right will not form the subject of transfer by the act of parties or operation of law; but it should be observed, on the other hand, that such a right includes the right of residence in a family dwelling-house. It was said in *Mangala Debi* v. *Dinonath Bose*[6] that a son could not convey to a stranger such a right to a family dwelling as to deprive his mother of her right of residence. It would be strange, therefore, to allow a Hindu widow to transfer such a right of residence to an utter stranger, or to make such a right available for the purposes of an execution of decree against the widow. On the whole, it may be said that having regard to the domestic arrangements of a purely Hindu family that seems to be the sound policy which would prevent the alienation by a Hindu widow of her future right of maintenance.

"A mere right of suit," it has been said, "is not property, but a title to recover future property,"[7] and the Transfer of Property Act provides that a mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.[8] Cases as these, it should be observed, relate to actions in tort or actions *ex delicto*, and the general rule is that with respect to injuries affecting the health or security of a person an action cannot be transfer-

[1] S. 266 cl. *l*.

[2] I. L. R. 2 Bom., 503.

[3] 8 B. L. R., 228.

[4] I. L. R. 2 Bom., 517.

[5] 20 W. R., 336.

[6] 4 B. L. R., 72, O. C. J.

[7] Taffazul Hossein Khan's case, 7 B. L. R. 195, (P. C.).

[8] S. 6, (*e*).

rable.[1] On this point one may note with advantage the well-known maxim—*Actio personalis moritur cum persona.*[2]

Neither the salary of a public officer nor any compensation that may have been allowed to him is an assignable article.[3] In *Wells* v. *Foster*,[4] the defendant had held a situation as clerk in the audit office for upwards of twenty years when, the establishment being reduced, he was placed on a retired allowance granted to him not for life, but as an allowance for maintenance until he should be called in to serve again. The defendant, being afterwards in execution at the suit of the plaintiff, executed to him an assignment of his annuity. The deed of assignment contained a covenant that the defendant had good title to assign the annuity. In consideration of the execution of this deed, the defendant was discharged from custody. After the discharge, the plaintiff's debt remaining unpaid, he obtained an injunction to restrain the defendant from securing or assigning over any part of his pension which was subsequently dissolved upon the terms that the defendant's attorney should receive the pension and pay it into a banking-house, and the plaintiff should be at liberty to bring any action he might be advised for the amount so paid in. Plaintiff brought his action accordingly. Parke, B. there said that the action was not maintainable upon the ground that on principles of public policy, the allowance granted to the defendant was not assignable by him. "The correct distinction made in the cases on this subject," observed the learned Judge," is that a man may always assign a pension given to him as a compensation for past services. In such a case, the assignee acquires a title to it both in equity and at law, and may recover back any sums received in respect of it by the assignor after the date of the assignment. But when the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, it is against the policy of the law that it should be assignable." In *Flarty* v. *Odlum*,[5] where the question arose whether or not the half pay of the defendant as a lieutenant in a reduced regiment of foot should be included in his schedule in insolvency, LORD KENYON, C. J. observed :—"I am clearly of opinion that this half pay could not be legally assigned by the defendant, and consequently that the creditors are not entitled to an assignment of it for their benefit. Emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned; for persons who are liable to be called out for the service of their country ought not to be taken

[1] Consider the case of *Chamberlain* v. *Williamson*, 2 M. and S. 408.

[2] A personal right of action dies with the person.

[3] The Transfer of Property Act, S. 6, *f* and *g*.

[4] 8 Mees. and W., 149.

[5] 3 T. R., 681.

from a state of poverty. * * * It might as well be contended that the salaries of the Judges, which are granted to support the dignity of the State and the administration of justice may be assigned." Buller, J. there said, that if the question had been, whether or not the pay that was actually due might be assigned he should have thought it, like any other existing debt assignable; but that did not extend to future accruing payments. In *Ex parte* Batline,[1] Denman, C. J. was of opinion that a pension held under a department of His Majesty's Government could not be assigned except with the consent of the Heads of the Department as required by the Act.[2]

It will be seen that the principle upon which salaries and pensions of public officers are rendered unassignable is founded on the grounds of public policy. "It is fit," such is the observation of LORD ABINGER, C. B., "that the public servants should retain the means of a decent subsistence, without being exposed to the temptation of poverty." And whatever distinctions may have formerly been drawn between salaries accruing and salaries accrued, they have been now completely done away with by the Transfer of Property Act. Clauses *f* and *g* of section 6 of that Act are to this effect:—"A public office cannot be transferred, nor can the salary of a public officer, whether *before* or *after* it has become payable; stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred."

We have already had occasion to observe on a former occasion that persons who are actually the owners of things are sometimes unable to transfer their ownership by reason of mental or bodily incapacities, or upon certain political grounds.[3] It will be unnecessary here to recapitulate that topic.

It has been premised that a person who does not possess a right to a thing has nothing to give or to transfer. "Non dat qui non habet" is an old maxim, and sounds almost like a truism. Nevertheless, it would appears that prior to the enactment of 8 and 9 Vict. c. 106, if a tenant for years made a feoffment, this feoffment vested in the feoffor a defeasible estate of freehold; for according to the ancient doctrine, every person having possession of land, however slender, or howevr tortious his possession might be, was (unless he were the mere bailiff of the party having title) considered to be in the seisin of the fee, so as to be able by livery to transfer it to another, and, consequently if his feoffor had, subsequently to the conveyance, levied a fine,[4] such fine would at the end of five years

[1] 4 B. and Ad., 696.

[2] 7 Geo. 4, c. 57, s. 29.

[3] See Lecture VII.

[4] A fine was a form of assurance. Fines were fictitious actions commenced and then compromised by the leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties. They were called fines (*finis* = end) from their having anciently

after the expiration of the term have barred the lessor.[1] But, under that statute, such conveyances have now been rendered infructuous. In connection with this, note also the observation of Ulpian[2] that no one can transfer a larger right than he should himself possess (nemo plus juris ad alium transferre potest, quam ipse haberet). One reads in the Transfer of Property Act that "no transfer can be made in so far as it is opposed to the nature of the interest affected thereby." When, therefore, a man professes to convey a larger interest than he himself possesses, the conveyance will necessarily be void with respect to the excess. In 2 Wms. Saund, 418*b*, note (*c*), it is said, "It is not essential that the grantor should convey the real interest only which he has in the estate; for if he grants a larger interest than he is entitled to, still, *some* interest passes by the conveyance though it be for a shorter period than he intended and the conveyance professes to grant." However, although nothing passes from a man who has nothing to impart, the result in certain cases under the doctrine of estoppel is thus explained by Sir John Leach, V. C.:[3]—"Where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, then if by any means he afterwards acquires an interest in the estate, he is estopped from saying, as against the other party to the indenture, contrary to his averment in the indenture, that he had not such interest at the time of its execution." "Where a person," in the words of the Transfer of Property Act, "erroneously represents that he is authorized to transfer certain immoveable property, and proposes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists."[4] This is an illustration of the quaint saying that "void things may be good for some purpose." Connected with the doctrine of estoppel is the principle laid down in s. 41 of the Transfer of Property Act that "where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not

put an end as well to the pretended suit, as to all claims not made within a year and a day afterwards, a summary method, grounded on the solemnity and publicity of the proceedings as taking place in open Court. Fines have now been abolished, and a deed enrolled in the Chancery Division of the High Court has now been substituted in their place. Will. Real Prop. 48, 49, 50.

[1] Broom's Legal Maxims, 467, 468.

[2] D. 50, 17, 54.

[3] *Bensley* v. *Burdon*, 2 Sim. and St., 526.

[4] S 43.

authorized to make it · provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith " "If a man," writes Mr. Justice Story. "having a title to an estate which is offered for sale, and knowing his title, stands by and encourages the sale or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by and being silent will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase. So, if a man should stand by, and see another person as grantor execute a deed of conveyance of land belonging to himself, and knowing the facts should sign his name as a witness, he would in equity be bound by the conveyance." Of course, where the consent on the part of the true owner is express, there is no difficulty whatever in the matter. As it has been said, "if I grant unto J. S. authority for my deed to demise for years the land whereof I am now seised or hereafter shall be seised, and after I purchase lands, and J. S. my attorney, doth demise them, this is a good demise." It should be observed that benamidars, or persons in whose mere names, conveyances are taken, may pass proprietary rights under the law. In *Rennie* v. *Gunga Narain Chowdhry*,[1] it was said that "if a vendee purchases for a valuable consideration, and without notice of the *benamee*, from one who in the eyes of the world is the absolute owner of a property, and who holds that property to all appearances under a good and sufficient title, he would be protected from the subsequent acts of the real owner or of his heir, both of whom were parties to the fraud; and that his purchase would hold good against any subsequent sale made by them." Such a rule has, indeed, been laid down for the protection, as we shall hereafter see more fully, of *bonâ fide* purchasers. The judgment in the case just cited then proceeded to this effect:— "The defect in the title was a latent one which the special appellant, (*i. e.*, the purchaser) could not by any reasonable inquiry, have discovered; and the party who assisted in deceiving cannot now take advantage of his own fraud and sell to another what has already been made over for value to the original purchaser."

The persons whom the law permits to convey title to property of which the actual ownership is not in them are mamy. We shall consider first of all the extent of the power which guardians possess over the estate of their wards.

Paulus thus lays down the definition of guardianship as given by Servius:[2] —"Tutela est, ut Servius definit, vis ac potestas in capite libero ad tuendum eum, qui propter ætatem suâ sponte se defendere nequit jure civili data ac permissa." In other words, it is the force and power over a free person given and permitted by the Civil law in order to protect him who by reason of age is unable to

[1] 3 W R., 11.

[2] D 26, 1,

defend himself by his own will. Children under the age of puberty must be placed under tutela[1] when there was no tutor appointed by the will of the father or paterfamilias, (tutela testamentaria) nor agnates that could act as tutors (legitima tutela). Certain magistrates had the power to appoint tutors. There was another class of guardians under the Roman law, known as curators. Curators were appointed either by will or by the *prætor*. A person above the age of puberty and until the completion of the twenty-fifth year may have a curator. Lunatics and prodigals also had curators. The curator was appointed to look after the property only of the non-compos, except in the case of a lunatic whose person was also placed under his protection.[2] It appears from the observation of Ulpian that guardians were prohibited from transferring in any way the lands of their wards, unless under the decree of the *prætor* or the direction of the parents (nisi ut id fieret parentes testamento vel codicillis caverint).[3] The general rule was that tutors and curators should bestow the same care and diligence on the affairs of their pupils which the father of a family ought in good faith to do in respect of his own affairs (a tutoribus et curatoribus pupillorum eadem diligentia exigenda est circa administrationem rerum pupillarium quam paterfamilias rebus suis ex bonâ fide præbere debet).[4]

It appears that the Roman law on the subject of guardianship is generally followed in modern Europe.[5] In England, among natural and other guardianships, there is the guardianship by appointment of the Lord Chancellor. For, as the father my fail to exercise the power in that respect, the Court of Chancery is held to possess a general jurisdiction with respect to infants, and, if application be made to it on behalf of an infant, who has no other guardian, will appoint him one for protection both of his person and estate, and the Court will regulate the conduct of guardian generally.[6] With regard to the power of transfer, it is laid down that no guardian can aliene his ward's estate, except by lease during the ward's minority; and a demise for a longer period becomes void as soon as the period of guardianship determines. A guardian appointed by the Court can grant no leases except by the sanction of the Court, but the Court's sanction will enable him or any other guardian to make a lease that will bind the infant even after he attains twenty-one.[7]

Under the Mahomedan law, the authority of a guardian in pursuance of the order of the magistrate may be continued over the property of a person until he

[1] J. 1, 20, 6.
[2] Justinian's Institutes.
[3] D. 27, 9, 1 and 2.
[4] D. 26, 7, 33.
[5] Les Codes Civils 'Etrangérs *par* Saint Joseph, Introduction XXX.
[6] Stephens Commentaries, Vol. 2, p. 325.
[7] *Ibid*, 329.

be twenty-five years of age.[1] A guardian, under that law, has no power to sell the immoveable property of his ward. "For as a father" in the words of the Hidaya,[2] "is authorized to sell the moveable property of his adult absent son, but not such as is immoveable, his guardian has the same power."

The British Indian law on the subject is in the main a reproduction of the Roman law as modified by the English law. There is the natural or *legitimate* guardian, the guardian appointed under deed or will, and the guardian appointed by the Civil Court. In addition to these there is the institution of the Court of Wards whereby the Government is known to take over directly the charge of the estate of disqualified persons. Before the passage of Act XL of 1858 which gives the courts power to appoint guardians, the law as to the guardian's power of transfer was thus laid down by LORD JUSTICE KNIGHT BRUCE in Hanuman Persad Panday:[3] "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be avoided, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." The object of Act XL of 1858 was to make better provision for the care of the persons and properties of minors not brought under the superintendence of the Court of Wards. S. 2 runs as follows: "Except in the case of the proprietors of estates paying revenue to Government who have been or shall be taken under protection of the Court of Wards, the case of the persons of all minors (not being European British subjects),[4] and the charge of their property shall be subject to the jurisdiction of the Civil Court. Then follows this section: "Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise may apply to the Civil Court for a certificate of administration." The necessity for such a measure, as the act under consideration provides, is thus explained by Garth, C. J. in the important judgment in Sikher Chand's case:[5] "The

[1] Hidayá, Inhibition.

[2] Hamilton's Hidayá, 702.

[3] 6 M. I. A., 423.

[4] Under the Charter of 14 Geo. III, the Supreme Court of Judicature at Fort William in Bengal was authorized and empowered to appoint guardians and keepers for infants and their estates, according to the order and course observed in that part of Great Britain called England, and also guardians and keepers of the persons and estates of natural fools, and of such as are, or shall be deprived of their understanding or reason by the act of God, so as to be unable to govern themselves and their estates.

[5] I. L. R., 5 Cal., 380.

powers exercised by guardians of minors under the Hindu law, had given rise to great inconvenience, and been productive of much fraud and litigation. A Hindu guardian, let him be ever so honest, was often in doubt and difficulty as to how he ought to deal with a minor's property under circumstances of pressure. The family might be very seriously in debt. It was often a doubtful question both of law and fact, whether the minor was liable for any and what portion of the family debt; or whether the necessity was sufficiently urgent to justify the sale or mortgage of the minor's immoveable estate. The guardian was oftentimes a *purdah-nasheen* lady, or some other member of the family, entirely ignorant of law and business, and of the true state of the family affairs; too often guided by the advice of some unreliable mooktar, and under the influence of the members of the family, whose interests might be adverse to those of the minor. The minor's position, even under these circumstances, was sufficiently unfortunate; but it was of course still more so, if the guardian himself, as not unfrequently happened, was a dishonest man, whose interest and whose object was, to sacrifice the minor's property to his own advantage. No wonder that in this state of the law, the estates of minors were so constantly sold and mortgaged without legal necessity. No wonder that when brought to sale, they were sold at ruinous sacrifice. No wonder that the purchasers of those estates, as well as the minors themselves should so often have been the victims of fraud and ignorance, and that dealings of this kind with the property of minors should have proved such a fruitful source of litigation. It was to remedy these evils, I conceive, and to assimilate the law in this country more closely to the English law upon this subject, that s. 18 of Act XL of 1858 was enacted." Section 18 lays down the powers of a certificated guardian in these words: "Every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same power in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts and liabilities due to, or by the estate of the minor. But NO SUCH PERSON SHALL HAVE POWER TO SELL OR MORTGAGE, OR TO GRANT A LEASE THEREOF FOR ANY PERIOD EXCEEDING FIVE YEARS without the order of the Civil Court previously obtained."

In *Ram Chunder Chuckerbutty* v. *Brojonath Mazumdar*,[1] in the opinion of the Full Court, "it is not necessary for all guardians to obtain such a certificate and that an uncertificated guardian has the same right and obligations as regards the minor and his property since the Act, as he had before it was passed. But in the case of minors of large property, specially immoveable property, the Act renders it very desirable (although not absolutely imperative) that their guardians should obtain a certificate, and thus place themselves under the

[1] I. L. R. 4 C., 929.

protection and authority of the Court." The distinction between the power, of an uncertificated and those of a certificated guardian consists in this, that whereas in the case of a transfer by the former the *onus* lies on the transferee to show that he acted in good faith, that he made proper inquiries as to the necessity for the transfer, and had honestly satisfied himself of the existence of that necessity,[1] in the case of a transfer by the latter under the orders of the Court, the *onus* lies on the minor or his representative to make out a *primâ facie* case of fraud or illegality, and show that the debt or sum of money which formed the consideration for the transfer was one for which the minor was not responsible.[2]

It was said in Roshun Singh's case[3] that "the mother or guardian of a Hindu minor, although a certificate of guardianship has not been granted to her under Act XL of 1858, may deal with the estate of a minor within the limits allowed by the Hindu law."

The Court of Wards, as guardian, has power to sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may do all such acts as it may judge to be most for the benefit of the property and the advantage of the ward.[4] In *Sarabjit Singh* v. *F. C. Chapman*, the Privy Council made a distinction between the powers of a mere manager under the Court of Wards and those of the Court of Wards itself. In that case the Civil Court contemporaneously made an order appointing as the manager of the property of a disqualified proprietor the same person who was appointed as the manager under the Court of Wards. Thereafter, under the sanction of the Chief Commissioner, (the property being in Oudh) a lease for twenty-five years from the Court of Wards, as manager, was obtained of some villages. LORD BLACKBURN there said[5]:—that in s. 14 of the Act the word "manager" did not include the Court of Wards, adding that "the one point relied upon against the lease is, that it could not be granted for more than five years, and that objection, whatever might be its importance if the lease had been granted by one acting only under the authority of an appointment as manager by the Civil Court, does not seem to apply to a lease granted by the Court of Wards."

A manager of a lunatic appointed under Act XXXV of 1858 does not possess the power to sell or mortgage the estate or grant a lease of any immoveable property for a period exceeding five years without the order of the Civil

[1] See Hanooman Persad Panday, 6 M. I. A. 423, Roopnarain Singh's case. 9 W. R., 297, Syed Lootf Hossain's case, 23 W. R., 424.

[2] Sikhur Chand's case, I. L. R. 5 C , 388.

[3] I. L. R. 3 All., 535.

[4] The Court of Wards Act, s. 18.

[5] I. L. R. 13 Cal., 84, 85.

Court by which the manager was appointed. Nor has the natural guardian of a lunatic any higher powers than the Committee.[1]

The institution of joint family which still prevails among the "Hindu" population in British India has given rise to much discussion with regard to the extent of the power of the eldest agnatic or managing member of the family to dispose of the joint property. The question is one of special importance in relation to Mitakshara families. In Mitakshara families the son possesses a right co-equal with the father in respect of ancestral immoveable property, and until partition the interest of one of the coparceners in the joint property survives by a sort of *jus accrescendi* to the joint male agnates; so much so, that in Nursinbhat's case[2] where P, an undivided Hindu coparcener, had died leaving him surviving a brother C and a son N, and N subsequently died leaving C as the only surviving member, it was HELD that the family property which on N's death became vested by survivorship in C was not in his hands liable for the separate debts of P or N in a suit brought by plaintiff against C in a bond executed by P as surety for one R.

In *Deen Dayal* v. *Jugdeep Narain*, it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt, does acquire the share of the latter in such property with the power of ascertaining and realizing it by a partition.[3]

The power of a managing coparcener is thus defined in Bábáji Mahadáye's case.[4] "Family necessity," observes West, J., "is an expression that must receive a reasonable construction, and the head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude too must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precautions where a minor son has an interest in the property." It should be noted that there is no distinction between the power of transfer of a managing coparcener of a joint family under the Dayabhaga, and that under the Mitakshara school. Under the Dayabhaga, however, one coparcener may transfer his right to a share in the joint family property without the consent of the other. Under the Mitakshara law, in which the joint family system appears in its old form, the power of one coparcener to transfer even his own share in the joint undivided estate has formed the subject

[1] *The Court of Wards* v. *Kupalman Singh*, 10 B. L. R. 364.

[2] I. L. R. 2 Bom. 375. See, Udaram Sitaram's case, 11 Bom. H. R, 76.

[3] I. L. R. 3 C., 198.

[4] I. L R 2 Bom, 669

of much discussion. And the question seems to have given rise to special difficulty when the coparceners are father and sons. "There can be little doubt," observes Sir J. Colville,[1] "that all such alienations, (*i. e.*, alienations by one coparcener without the consent of the others), whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family." It has, however, been settled both in the Madras and Bombay Presidencies that one coparcener may dispose of ancestral undivided estate by private contract and conveyance to the extent of his own share, and that such share may be seized and sold in execution for his separate debt.[2] The establishment of this law, in the words of the Privy Council,[3] has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. In Bengal, however, with regard to Mitakshara families, the law that one coparcener may alienate his share of the joint and undivided property without the consent of the other coparceners has not yet been adopted. In *Sadaburt Prosad Sahu* v. *Foolbash Koer*,[4] it has been held that one coparcener has not authority without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate in order to raise money on his own account, and not for the benefit of the family; and it was there doubted whether under a decree against one coparcener in his lifetime, his share of joint property could be seized and sold in execution. In *Deendayal Lall* v. *Jugdeep Narain*,[5] their Lordships of the Privy Council explained the distinction that may be made between a voluntary and compulsory transfer:— "Their Lordships feeling," the judgment proceeds, "that the question of the rights of an execution creditor and of a purchaser at an auction sale, was expressly left open by the decision in Sadaburt's case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, at least in respect of those rights, should be declared to be the same in Bengal as that which exists in Madras. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in Sadarburt's case as to voluntary alienation; but, however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and, in some cases, does exist between them. It is

[1] Suraj Bunsi Koer's case, I. L. R. 5 Cal., 166.

[2] Peddamuthulaty's case, 2 Mad. H. 270, Virasvami Grumini's case, 1 Mad. H. 471, J. Rayacharlu's case; 4 Mad. H. 60. Damodar Vithal's case, 1 Bom. H. 183, Pandurang Anandrav's case, 11 Bom., 72.

[3] Suraj Bunsi Koer's case, I. L. R. 5 Cal., 166.

[4] 3 B. L. R. (F. B.), 31.

[5] I. L. R. 3 Cal, 198.

sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his copartners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value. It seems to their lordships that the same principle may, and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition which his debtor might have compelled, had he been so minded, before the alienation of his share took place." Deendyal's case has thus assimilated the Mitakshara law in Bengal to that which obtains in Madras and Bombay with respect to compulsory transfer.

It may be as well here to note another distinction which their Lordships of the Privy Council have pointed out in Taffazul Hossain's case,[1] between voluntary and compulsory alienation. "A thing may be done," it was there said, "by contract, but not by an act of the Court. For instance, if a creditor desires to have a security on the receipts of a salary as they accrue due, that can be effected only by contract with the debtor and arrangement with him, and not by an attachment by the act of a Court."

The question as to how far the case of a father as coparcener differs from the case of other coparceners is one, the solution of which has presented much difficulty. The ancient text which has given rise to conflicting opinions with regard to the father's right of transfer in relation to ancestral property is thus laid down by Yájnavalkya; "The ownership (स्वाम्यं) of both father and son is the same (सदृशं) in land, a corrody, or wealth (द्रव्यं) received from the grandfather (पितामहः)[2]" According to some commentators, the word *dravya* in the text (which is translated as wealth) is confined to gold, silver, pearls, gems and corals;[3] while others would give the word its general signification of property of all description.[4] Vijnáneswara commenting on the text says that the sons have no control over property of any description acquired by the father himself;[5] but then again the same commentator, in cl. 27, c. 1, s. 27, quotes a text from which it appears that the sons are independent of

[1] 7 B. L. R. 195 (P. C.).

[2] Yájnavalkya:—Vyavahárádháyay: भूर्द्धा पितामहोपात्ता निबन्धो द्रव्यमेव वा। तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि.

[3] मनिमुक्त प्रवालानाम् सर्वस्यैव पिता प्रभुः &c. Mitakshara, c. 1 s. 1.

[4] Mandlik's Hindu Law, 215, notes.

[5] पित्रार्जितें तु न निषेधाधिकारः Mitákshará c. 1, s. 5, cl. 9.

their father in respect of all immoveable property whether self-acquired or inherited.[1] His own observation, however, seems to be this: "As for the text, the father is master of the gems, pearls and corals, and of all other moveable property, but neither the father nor the grandfather is master of the whole immoveable estate, it relates to *immoveables which have descended from the ancestors.*" Sir J. Colville in *Suraj Bunsi Koer's* case[2] very properly observes "that under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate is indisputable. Upon the question whether he has the same right in the self-acquired immoveable estate of his father, and what are the extent and nature of the father's power over ancestral moveable property there has been greater diversity of opinion." It was thrown out in that case that it was the settled law in the Courts of the three Presidencies that "a son can compel his father to make a partition of ancestral immoveable property." There is, however, no case, as far as I am aware, where the question whether the sons in a Mitakshara family can as a matter of course call for partition of the ancestral estate against the wishes of the father, or *patre invito*, has directly come before the Privy Council. The cases in the Indian Courts where the sons have been held to be entitled to call for partition from the father are generally cases in which the father has been guilty of immoral or extravagant conduct. There are, however, cases in which the Calcutta, Madras and Allahabad Courts have distinctly held that a son may under all circumstances enforce partition of ancestral immoveable property as against the father.

In *Laljeet Singh* v. *Rajcoomar Singh*,[3] Phere, J. laid down, after an elaborate examination of the texts and authorities, that "the sons can at any time during the father's life, at their pleasure (even when any of the contingencies which entitle them to divide the whole estate has not happened) call upon him to partition the ancestral property."

In *Nagalinga Mudaliar* v. *Subbiramarya Mudaliar*[4] Scotland, C. J., while inclining to the view that the sons are only authorized to ask for partition as against their father under special circumstances, lays down upon the authority of Mr. Justice Strange that "sons may at their wiil, and irrespective of all circumstances, compel their father to divide with them the ancestral property."

In *Kaliprashad* v. *Ramcharan*[5] it was held that "in the case of ancestral immoveable property, the son has under the Mitakshara law, an unqualified right to demand partition."

[1] स्थावरस्य तु सर्वस्य न पिता न पितामहः Mitákshará.

[2] I. L. R. 5 Cal., 164.

[3] 12 B. L. R., 83.

[4] 1 Mad. H. R., 79.

[5] I. L. R. 1 All. (F. B.), 159.

The question as to the extent of the son's right to call for partition does not, strictly speaking, arise in this place; but it may be observed that it is not altogether free from doubt upon the authorities whether a son like any other coparcener may demand partition against his father as a matter of course. It is, undoubtedly, the law as laid down by Sir J. Colville upon a consideration of the decision in *Muddun Thakoor* v. *Kuntoo Lal*,[1] "that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes." Note also this observation of their Lordships:—Even if the father have sold ancestral property for the discharge of his own debts, not incurred for immoral proposes and the application of the bulk of the proceeds in payment of the debts have been satisfactorily accounted for, that a small part is not accounted will not invalidate the sale. The dictum of LORD HOBHOUSE in Nanomi Babusin's case[2] is to this effect:—"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate there is now no conflict of authority." Note, also, the passage in Manu[3] with Kulluka's gloss[4]:—"After the death of the father let the brothers divide the paternal wealth."

The father unlike any other coparcener is, it should be remembered, naturally the manager of the joint family estate, nor has it ever been disputed that the Hindu law has imposed grave obligation on the sons to pay their father's debts, or, at all events, debts which have not been incurred for immoral or improper purposes. Indeed, to allow a reckless son to call for partition against the wishes of a prudent father would not only be pernicious in practice, but deprive the father of the security on which he might obtain loans for many a temporal purpose without the taint of immorality by subtracting from the property which was the original and proper fund for the payment of his debts. It would, moreover, open wide the door to fraud by inducing an encumbered father to encourage his sons to sue him for partition, and thus deceive the expectation of the creditors.

[1] L. R. 1 I. A. 333.

[2] I. L. R 13 Cal, 35.

[3] C. 9 V. 104.

[4] Pundit Bharat Chandra Seromani's Institutes of Manu. भ्रातरो मिलिता पित्र मरणा-दूर्द्धं पैतृकं धनं विभजेरन्।

The distinction is here worthy of note that has been explained in Sadabart Sahu's case[1] between the position of a joint tenant under the English law and that of a coparcener under the Mitákshará. Peacock, C. J. there observed: "I was at one time disposed to think that as one of several members of a joint family can compel partition of ancestral property against the will of others, so he might without the will of the others alienate that share which he would be entitled on partition, but upon reflection I feel that that opinion cannot be maintained upon the true principle of the Mitákshará law. * * * According to the law of England if there be two joint tenants, a severance is affected by one of them conveying his share to a stranger, as well as by partition; but joint tenants under the English law are in a very different position from members of a joint Hindu family under the Mitákshará law; for instance, if a Hindu family consists of a father and three sons, any one of the sons has the right to compel a partition of the joint ancestral property; but upon partition during the lifetime of the father, his wives are entitled to shares, and if partition is made after the death of the father, his widows are entitled to shares, and daughters are entitled to participate."

We will next proceed to examine a Hindu widow's power of transfer. It is well-known that under the Hindu law a female heiress, whether a widow, daughter or mother, takes the same kind of estate. In Jadoomony Devi's case,[2] Colville, C. J. thus explains the nature of that estate:—"The estate of a Hindu widow is very different from a mere life-estate. The case of *Cassinath Bysak* v. *Hurrosundari Devi*[3] which has long given law to this Court, and, since it is a decision of the Privy Council, ought to have given, if it has not given the law to the Courts of the East India Company, establishes that the estate of the widow is something higher than a life-estate: that it entitles her to the possession of the estate without restriction; and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible, exactly to define further than by saying that the propriety of any particular exercise of that power must depend on the circumstances in which it is made, and must be consistent with the general principles of Hindu law regarding such dispositions. The cases which have established in this Court the right of the reversionary heirs, though their interest is only contingent, to maintain a suit to restrain waste by the widow, are quite consistent with what I have stated above. In one of the cases, Sir Lawrence Peel says, *the estate though sometimes so expressed to be is not an estate for life. When a widow alienates she does so by virtue of her interest, not of a power, and she passes the absolute interest which she could not do if she had but a life-estate.*" There, after reviewing a host of cases, the learned

[1] 3 B. L. R. (F. B.) 43.

[2] 1 Boulnois, Rep., 120.

[3] Clarke's Rules and Orders, 191.

Chief Justice came to a conclusion, the undoubted result of which is that a Hindu female who takes by succession may not only by surrendering her estate to the then next reversioner invest the latter with the absolute estate of the deceased; but with the latter's consent make an absolute conveyance to a stranger.

In *Noffer Das Roy* v. *Madhu Soondari Burmonia*,[1] where the question was with regard to the effect of the Hindu widow's surrender of her estate to the then next reversioner, Jackson, J. observed :—"On that part of the case, I think it sufficient for us to refer to decided cases in our own Court in which this very point has been raised. These cases appear to me to be absolutely decisive of the question so far as we are concerned. One is the case of *Shama Soondoree* v. *Surat Chunder Dutt*[2] in which the judgment was delivered by myself, but in which I had the assistance and concurrence of Mr. Justice Dwarka Nath Mitter. In a case turning upon a most important point of Hindu law, I need hardly say that it is the assent of Mr. Justice Dwarka Nath Mitter which gives its chief value to that judgment. Then, in addition, we have a quite recent case—*Gunga Pershad Kur* v. *Shumbhoo Nath Burman*[3] decided by Mr. Justice Romesh Chunder Mitter. In both these cases it is held, that a surrender by a Hindu widow or mother (for the two cases I think are not distinguishable) to persons who at the time are unquestionably the heirs by Hindu law of the person from whom she has inherited, vests in those persons the inheritance which they would take if she at that time were to die." In Rojoni Kant Miter's case[4] it was said that a Hindu widow was competent to alienate with the consent of the next heir an estate in which she possesses a life-interest. In *Trilochun Chuckerbutty* v. *Umeshchunder Lahiri*,[5] it was accepted as settled law that an alienation by a Hindu widow of her deceased husband's estate with the consent of the then next reversioner is binding upon the persons who may be the heir of the husband at the time of the widow's death.

Legal necessity, it should be borne in mind, is always a valid reason for the absolute transfer of the deceased's estate by a Hindu widow; but it has been held in several cases that any alienation by a widow for other than legal necessity may, although without the conset of the next reversioners, hold good during her life. In Perinja Gaundun's case,[6] the plaintiffs sued for recovery of lands being the estate of their deceased relative, the husband of the first defendant, for the possession of the estate which she had alienated to a stranger. The first defendant pleaded that she had entrusted half the lands in question to the

[1] I. L. R. Cal. 735.
[2] 8 W. R., 50.
[3] 22 W. R, 393.
[4] Marshall's Rep., 241.
[5] 7 C. L. R. 571. See, also, Mohunt Kishen Gir *v.* Busjeet Roy, 14 W. R., 378.
[6] 1 Mad. H., 206.

second defendant on condition of his paying to her periodically a share of the profits, and that she had sold the other half to the same defendant. The answer of the second defendant was to the same effect. The Court of first instance held that the alienation of the property was not shown to have been made for purposes admissible in law, in a case such as that of the first defendant who is a widow without surviving issue, and the transfer by sale or otherwise to the second defendant could, therefore, have no effect after the death of the first defendant. On those grounds the Munsiff decreed that the first defendant should be replaced in possession for the term of her life, and that after her death the property should revert to the plaintiffs as the heirs-at-law of the deceased husband of the first defendant. On appeal, Frere and Holloway, JJ., held that the sale and transfer from the first to the second defendant was clearly invalid by Hindu law, and could have no effect, therefore, as against the right by succession to which the plaintiffs were entitled on the death of the widow as the legal heirs of her deceased husband; but that the second defendant was not liable to be dispossessed, and agreed with the Munsiff in disallowing the plaintiff's claim to immediate possession. In *Gobindmoni Dassi* v. *Shamlal Bysack*,[1] upon a review of all the cases, it was held by Peacock, C. J. in Full Bench that "a conveyance by a Hindu widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste, which destroys the widow's estate, and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life The reversionary heirs are not after her death bound by the conveyance; but they are not entitled during her lifetime to recover the property either for their own use or for the use of the widow, or to compel the restoration of it to her." In *Prag Das* v. *Hari Kissen*,[2] the widow had allowed one of the reversioners to take possession in his own right of all the property of the deceased which she had inherited. In a suit by the other reversioners for a declaration of present right and possession in respect of the property, it was held "that the act of the widow divesting herself of her interest in the estate will not operate as a forfeiture so as to bring in the reversionary heirs and was valid during her life."

It may be well to mention that although a Hindu woman's power of transfer is unlimited with regard to the *stridhanam* or the woman's *peculium*, it seems to be an established rule of law that a Hindu wife's right of transfer with regard to immoveable property, whether left to her by the will, or conferred upon her by the gift, of her husband is of the same qualified character as her right over an estate derived by her as an inheritance, unless the husband has chosen to give her in express terms a heritable right or power of alienation.[3]

[1] B. L. R *Sup*, 53

[2] I L R 1 All, 105.

[3] *Koonjbehari Dhur* v. *Premchand Dutt*, I L. R 5 Cal, 687.

In the next place, we shall consider the cases of Shebaits and Mutwallis. It was said in Arruti Misser's case,[1] that "a shebait is competent to lease the endowed lands to the best advantage and to appropriate the proceeds of the land for the purpose of keeping up the worship of the idol; indeed, without leasing out the lands it would be impossible to provide for the expenses of that worship." In Konwar Durga Nath Ray's case,[2] it was held that "the Shebait or Manager of a dewutter (dedicated to a deity) estate has authority, where the purposes of the endowment require it, to raise money by alienating a part of the estate, his position being analogous to that of a manager of an infant heir under the Hindu law." There, the written conveyance of certain lands stated them to be dewutter, and to be alienated to raise money to repair the temple of the idol In a suit to set aside the alienation, it appeared that at the time of the transaction, the temple required repairs; but that the vendor had not applied the whole of the purchase money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than as the conveyance expressed, the sale was considered to be valid. In *Prosunno Kumari Debya* v. *Golab Chand Babu*,[3] LORD JUSTICE KNIGHT-BRUCE observed:—"Notwithstanding that property devoted to religious purposes is, as a general rule of Hindu law, inalienable, it is competent for the shebait, in his capacity as shebait and manager, to borrow money for the proper expenses of keeping up worship, repairing temples, defending litigation and other like objects. The power, however, to incur such debts, must be measured by the existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir." In Shibessurree Dabee's case,[4] it was said that "where property is dedicated to the religious services of an idol, the rents of the land constitute in legal contemplation the property of the idol, and the shebait has not the legal property, but only the title of manager of a religious endowment, and cannot alienate the property, though he might create proper derivative tenures and estates conformable to usage. The creation of a tenure at a fixed invariable rent would be breach of duty in a shebait. The case of Burm Suroop Dás[5] explains that the power of a Mohunt who has only a life-interest extends to the creation of an interest not superior to his own, except under the most extraordinary pressure and the distinct benefit of the endowment."

The power of transfer of a Mussulman Mutwalli or manager of a religious

[1] 18 W. R., 439.
[2] I. L. R. 2 Cal., 341.
[3] 14 B. L. R. (P. C) 450, 23 W. R. (P. C.), 253.
[4] 13 M. I. A., 270.
[5] 20 W R, 471.

trust to alienate, is of a qualified character, and a transfer by gift or otherwise by him is illegal;[1] but a transfer made by him for purposes of the trust and the preservation of the trust property is permissible. "No person," it was said in Narayan's case,[2] "is competent to consume the original or the corpus of a waqf by sale, gift or any other way, as such disposition frustrates the purpose of a waqf." The term waqf is defined to be a contract, the fruit or effect of which is to tie up the original of a thing and leave its usufruct free.[3] The power of the *sajjada-nashin* (literally, the occupier of the prayer carpet) who holds for the *khanká* or *tukiagah* is similar. Note the observations in the Fatwae Alamgiri,[4] some are of opinion that if the sale of a portion of the waqf property would be advantageous for the parties interested, or the beneficiaries of the trust, such a sale would be valid." Again, "for repairs, debts tributes, &c.," alienation may take place under the authority of the judge and leases may be made."

It should be observed that trust deeds in this country may be classed under three heads. There is one class of trust deeds in which property and possession are given to the trustees and the trusts exhaust the property, so that no one outside the trust can have any claim; there is the second class of trust deeds in which the title or at any rate, possession is given to the trustees for the purpose of performing the trusts, but in which there may be a surplus of the property or income of the property after satisfying the trusts, which may belong to the heir-at-law or somebody else. The third class of deeds are those in which the property is allowed to continue in the hands of the heirs of the settler; but made subject to a charge for the benefit of the trust.[5]

I had occasion to suggest in the Introduction that in all probability the idea of a will in this country was first imported by the Mussulmans. An executor or *wasi*[2] is in Mussulman law defined to be an *amin* or trustee appointed by the testator to superintend, protect, and take care of, his property and children after his death. An executor under that law is allowed to sell immoveable property for the benefit of the minor, or for the liquidation of the debts of the deceased, or when there are provisions in the will which cannot be carried into effect without selling such property, or when the produce or income of the property does not exceed the expense of keeping it, or when it is in danger of being damaged or destroyed.[6] It is also said that when an executor has actually

[1] Jewun Dás Sahu's case 2 M. I. A. 930.

[2] I. L R. 5 Bom., 393.

[3] Waqf = TAHBIS UL ASALI WA ITLAK UL MANFIATE, Sharáya ul islam, *i. e.*, "Tie up the original and give up the fruit." See Shama Churn Sircar's Tagore Lectures.

[3] Vol. 11, 508.

[4] For this brief analysis I am indebted to an unreported judgment of Wilson, J.

[5] WASIUTNAMA = Will.

[6] See Baillie's Hidaya, Shama Churn Sircar's Tagore Lectures.

sold immoveable property (*akár*) for the payment of debts, while he has no other property in his hands sufficient for the purpose, the sale is lawful. It seems that the executor as guardian is allowed to sell his minor ward's immoveable property, although the father himself who is in the class of natural guardians is held to be generally incompetent to do so.

Under the law of British India, an executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he may think fit.[1] In *Whale* v. *Booth*,[2] LORD MANSFIELD, C. J., thus observes :— "The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator, that over them he has absolute power, and that they cannot be followed by the testator's creditors. It would be monstrous if it were otherwise, for then no one would deal with an executor. He must sell in order to effect the will. It is also clear, that if at the time of alienation, the purchaser knows they are assets, this is no evidence of fraud; for all the testator's debts may have already been satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms." Under the Probate and Administration Act[3] which applies to persons who are not governed by the Indian Succession Act, an executor or administrator can exercise the power of transfer only with the consent of the Court by which the Probate or Letters of Administration was or were granted, although the Court may exempt the executor or administrator from the necessity of obtaining such consent.

Under the Indian Insolvent Act,[4] the official assignee is the trustee for the creditors, and all powers vested in any insolvent which he might lawfully execute for his benefit, are vested in the assignee of the real and personal estate of the insolvent, to be executed by the assignee for the benefit of the creditors, and the assignee is authorized to make sale of the property and effects of the insolvent. In the Mofussil or under the Civil Procedure Code, the Court upon adjudication of insolvency may appoint a Receiver, who can, under the direction of the Court, exercise the power of transfer.[5]

The Receiver in a suit has the power to transfer, but only under the direction of the Court. The property in such a case in the hands of the receiver is really in the custody of the Court or in *custodia legis*. The observation of Phear, J. in *Wilkinson* v. *Gungadhar Sirkar* is worthy of note :—"The receiver's possession is not possession by any personal right. It is the possession of the Court, and he is totally devoid of any interest in the property. It appears to

[1] The Indian Succession Act, s. 269.

[2] 4 East's Rep., 625 *n*.

[3] Act V of 1881, s. 90.

[4] 11 and 12 Vict. c. xxi, ss. 30, 31.

[5] The Civil Procedure Code, s. 356, &c.

me that the order of the Court that the property should be sold by the receiver does not impose any liability or responsibility on the receiver, which is not borne by the officer of the Court, who usually carries out orders for sale in the absence of any express nomination of the person who should do so. I apprehend that the order of the Court that the property in suit should be sold is merely operative on the parties to the suit. It binds them, willing or unwilling, to the sale of the property which will be made under the order. Some one must of course act as the agent; and when any of the owners abstain from taking part in it, or are under any disqualification; the person must be some one appointed by the Court. The order that the receiver do sell, specifies that the receiver is to sell instead of the ordinary officer of the Court."[1]

Agents can transfer on behalf of their principal upon the maxim *qui facit per alium facit per se*, *i. e.*, whoever does a thing through another does it himself. This is a rule of such extensive application that a person might bind himself even by the acts of an infant agent.[2] Under The Powers of Attorney Act,[3] the donee of a power of Attorney may, if he thinks fit, execute or do any assurance, instrument or thing in, and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and a thing so executed and done, shall be as effectual in law as if it had been executed and done by the donee of the power in the name and with the signature and seal of the donor thereof. "Agency," observes Pollock, C. B. in *Reynell* v. *Lewis*,[4] "may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any, or it may be proved by showing that such a relation existed between the parties as by law would create the authority; as for instance, that of partners, by which relation when complete one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it, or the relation of husband and wife, in which the law, under certain circumstances considers the husband to make his wife an agent. In all these cases, if the agent in making the contract acts on that authority, the principal is bound by the contract, and the agent's contract is his contract and not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or by representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the

[1] 6 B. L R. 492, &c.

[2] The Indian Contract Act.

[3] Act VII of 1882

[4] 15 Mees and W, 526.

plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound."

In conclusion, I will refer to s. 7 of the Transfer of Property Act :—" Every person competent to contract and entitled to transferable property, or *authorized to dispose of transferable property not his own*, is competent to transfer such property."

LECTURE IX.

THE POWER OF TRANSFER:

CONDITIONS AND LIMITATIONS.

Alienation, Modern and Ancient Societies—*Cujus est dare ejus est disponere*—The Transfer of Property Act, SS. 7 and 10—*Bradley* v. *Peixoto*—*Foley* v. *Burnell*—*Brandon* v. *Robinson*—Restraint on alienation, condition of—*Piercy* v. *Roberts*—Transfer of Preperty Act, S. 12—Married woman, Her status—Brahmin law—Roman law—Mussulman law—English law—British-Indian law—Equitable doctrine of married woman's property—Restraint against anticipation, its limitations—*Pybus* v. *Smith*—*Scarborough* v. *Borman*—*Rennie* v *Ritchie*—*Barton* v. *Briscoe*—The Transfer of Property Act, S. 11—*Tulk* v. *Moxhay*—The law against Perpetuity—Bentham's Observation—*Taylor* v. *Horde*—*Dungannon* v. *Smith*—The Transfer of Property Act, SS. 13 and 14—*Porter* v. *Fox*—*Bentinck* v. *Duke of Portland*—Krishnaramani Dassi's case—Kumar Asima Krishna Deb's case—Religious Uses and Charities—Exception to the rule of Perpetuity—Superstitious uses—English and British-Indian laws—*Das Merces* v. *Cones*—*Moggridge* v. *Thackwell*—*Rickard* v. *Robson*—*Attorney-General* v. *The Iron Monger's Company*—Accumulation—Vested and Contingent interests—The Transfer of Property Act, ss. 21, 22, 23, 24—*Smith* v. *Packhurst*—Condition, defined—The Transfer of Property Act, s. 25—*Egerton* v. *Brownlow*—Condition in general restraint of marriage—*Perrin* v. *Lyon*—Conditional gifts—*Avelyn* v. *Ward*—*Underwood* v. *Wing*—Conditions Precedent and Conditions Subsequent—The Transfer of Property Act ss. 31, 32, 33 and 34—The Doctrine of Election—Cases illustrative—Partial restraint against alienation—*Gill* against *Pearson*—The law of Pre-emption—Cases illustrative.

If there is any one instance in which modern societies are found to differ from the old, it is that with regard to the alienableness of property. Ownership loses all its value in modern conception unless associated with the power of disposal, and alienableness has necessarily come to be regarded as its essential attribute. Indeed, as we shall presently see, it is this extraordinary partiality for alienation that has led modern legislatures to impose certain restrictions on the power of an owner to dispose of property according to his pleasure. It is an old maxim that the transfer of property has a right to regulate its disposal—*Cujus est dare ejus est disponere.* But the tendency of modern times has manifestly been to control the too free or capricious exercise of that right. While the law, on the one hand, lays down that "every person competent to contract and entitled to transferable property is competent to transfer such property, either wholly or in part, and either absolutely or conditionally," it says, on the other, that he can only do so "to the extent and in the manner allowed and prescribed by any law for the time being in force."[1]

[1] The Transfer of Property Act, s. 7.

Note the provision in section 10 of the Transfer of Property Act :—" Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void." The principle has been repeatedly acted upon in the English courts that the absolute interest of a person *sui juris* cannot be qualified, nor can any qualification be attached to property which is inconsistent with its nature.[1]

In *Bradley* v. *Peixoto*,[2] the testator made the following disposition by his will :—" I give and bequeath to my son Henry Bradley the dividends arising from my Bank stock for his support during the term of his life: but at his decease the said Bank stock, principal and interest, to devolve to his heirs, executors, administrators and assigns. Having observed during the term of my life so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessaries of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the Bank stock, the dividends from which is bequeathed to them in this will and testament for their support during their lives, such an attempt of my wife or any of my children shall exclude them, him or her, so attempting, from any benefit in this will and testament, and shall forfeit the whole of their share, principal and interest; which shall go and be divided unto and among my other children in equal shares, that will observe the tenor of this will and testament." A bill was filed by Henry Bradley against one of the daughters of the testator who had taken out administration. The prayer of the bill was, that the defendant might be decreed to transfer the Bank stock to the plaintiff. The Master of the Rolls there observed :—" The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff did not comply ; and the question is, *whether by the rules of this Court he can demand the legacy, not complying with the injunction, the testator has laid upon him ; or rather whether the condition is consistent with the gift.* I have looked into the cases that have been mentioned ; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. A condition, that tenant-in-fee shall not alien is repugnant ; and there are many other cases of the same sort. * * Where there is gift-in-tail with condition not to suffer a recovery,[3] the condition is void. There are several cases of this kind which

[1] *Tullet* v. *Armstrong*, 4 My. and Cr., 377.

[2] 3 Ves., 323, 324.

[3] Recovery was a fictitious proceeding in Court by which an estate tail was converted

show that a condition repugnant to the nature of the estate granted is void. It has been held that an exception of the very thing, that is the subject of the gift, is of no effect. In all these cases the gift stands, and the condition or exception is rejected. In this case, then I am under the necessity of declaring, that this is a gift with a qualification inconsistent with the gift, and the qualification must therefore be rejected."

In *Woodmeston* v. *Walker*,[1] Lord Brougham expressed that "the rule of law which prevents a party imposing fetters upon property inconsistent with the nature of the interest given is precisely the same in personal as in real estate. Thus, where the subject is of a personal nature, it is impossible so to tie up the use and enjoyment of it, as to create in the donee a life-estate which he may not alien."

In the case of *Foley* v. *Burnell*,[2] the question was much argued. There a great variety of clauses and means was adopted by Lord Foley with the view of depriving the creditors of his sons of any resort to their property; but it was there observed that if the property was given to the sons, it must remain subject to the incidents of property, and it could not be preserved from the creditors unless given to some one else.

In *Brandon* v. *Robinson*,[3] the testator directed that the eventual share and interest of his son in his estate and effects or the produce thereof should be laid out in the public funds or in Government securities at interest by, and in the names of, the trustees during his life, and that the dividends, interests and produce thereof as the same became due and payable, should be paid by them from time to time into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand, to the intent, that the same should not be grantable, transferable or otherwise assignable by way of anticipation of any unreceived payment or payments thereof, or of any part thereof, and that upon his decease, the principal of such share, together with the dividends and interest and produce thereof, should be paid and applied by his trustees and executors, their heirs, executors &c. unto, and amongst, such persons or persons as in a course of administration would become entitled to any personal estate by his said son, and as if the same had been personal estate belonging to him, and he had died intestate. After the death of the testator the son having attained the age of twenty-one became a bankruft. The plaintiff who was the surviving assigne under the commission filed a bill and prayed an execution of the trusts of the will and an account that the estates may be sold and the clear residue accertained,

into an estate in fee simple. The same purpose may now be served by the tenant in tail executing a deed enrolled in the Chancery Division of the High Court. Williams' Real Property.

[1] 2 Russ. and My., 205.

[2] 1 Bro. C. C. 224.

[3] 18 Ves. 435.

and that the plaintiff may receive the benefit of such part or share thereof or of his interest therein, as he should be entitled to as assignee under the commission. It was there HELD, that an estate for life with a proviso that it should cease on bankruptcy, was void. LORD ELDON said, "There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear generally speaking that if property be given to a man for his life, the donor cannot take away the incidents of a life-estate, and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it, and to prevent his creditors from obtaining any interest in the property though it is his. If that condition is so expressed as to amount to a limitation, rendering the interest short of a life-estate, neither the man nor his assignees can have it beyond the period limited."

In *Piercy* v. *Roberts*,[1] a testator by his will bequeathed to his executor a sum of money upon trust to pay, apply and dispose thereof, and of the interest and produce thereof, to and for the sole use and benefit of one of his sons in such smaller or larger portions at such time or times immediate or remote, and in such way or manner as they the said executors, or the survivor of them, or the executors or administrators of such survivor should in their judgment or discretion think best, and after bequeathing to his executors a further sum of like amount upon similar trusts for the benefit of another son, the testator proceeded as follows:—"And in the case of the death of either or both of my said sons before the whole of the said several sums and the interest thereof respectively shall have been paid or applied for the purposes aforesaid, then I will and direct that the unapplied part or parts thereof respectively shall sink into, and become part of my residuary personal estate, and go and be applied therewith as hereinafter mentioned," and the testator thereby appointed his wife, his residuary legatee. After the death of the testator one of the sons took the benefit of the Insolvent Debtors' Act. The bill was filed by the Assignee of the insolvents' estate against the executors of the testator to recover the legacy and the interest thereof or so much thereof as remained unpaid at the time of the discharge of the legatee under the Insolvent Debtors' Act. It was there argued on behalf of the assignee that the discretion given by the testator to his executors was a discretion subject to the incidents of property and consequently terminable by the bankruptcy or insolvency of the legatee, and it was admitted on the other side that "where a vested interest is given to a legatee, the property so given cannot be separated from its incidents." Sir John Leach, M. R., there observed:—"The question is, whether this legacy passed to the assignee of the insolvent upon the insolvency of the legatee; or whether it may remain

[1] 1 My. and K., 4.

in the hands of the executor to be applied at their discretion for the benefit of the legatee. The insolvent being the only person substantially entitled to this legacy, the attempt to continue in him the enjoyment of it, notwithstanding his insolvency, is in fraud of the law. The discretion of the executors determined by the insolvency, and the property passed by the assignment."

In *Hunt-Foulston* v. *Furber*,[1] the testatrix gave a sum of stock to be laid out by the trustees of her will in the purchase of a Government annuity in the name of, and for the benefit of her godson for the term of his natural life; and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity, the same should cease and form part of her residuary estate. The trustees purchased an annuity in the name, and payable during the life of the annuitant, and he entered into a contract to sell the same, it was HELD that the annuitant was absolutely entitled to the annuity, and that he could make a good title to it to the purchaser. Hall, V. C. there said, "no doubt there was an intention to prevent the annuitant from selling the annuity, and also an attempt to make the fund form part of the residuary estate, but there being a previous absolute gift, the latter intention is inconsistent with the gift itself."

In *Younghusband* v. *Gisborne*,[2] the testator by his will gave certain real estates to trustees upon trust to levy or raise yearly during the life of his brother an annuity or yearly sum of a certain value, and in case of his death in the interval between any of the days therein mentioned for the payment thereof, then a proportional part thereof up to the time of death. And he directed that the annuity and proportional part aforesaid should be held by his said trustees upon trust for the personal support, clothing and maintenance of his said brother, so as not to be subject or liable to the claims of any person or persons to whom he should attempt to charge, anticipate or otherwise encumber the same, nor to his creditors under a commission of bankruptcy or any act for the relief of insolvent debtors or to his own contracts, debts or other engagements. And the testator declared that the said annuity should be paid to his said brother himself from time to time, when and after the same should become due, until he should attempt to charge, anticipate or otherwise encumber the same, and from and after such attempt or claim, the same should be applied by his said trustees or some person under their direction for or towards the personal support, clothing and maintenance of his said brother, and for no other purpose whatsoever. After the death of the testator, the trustees duly paid the annuity to his brother, who subsequently took the benefit of the Insolvent Debtors' Act. The assignees thereupon instituted a suit for the purpose of obtaining the annuity. It was HELD that the annuity devolved to the

[1] L. R., 3 Ch. D. 285.

[2] 1 Collyer's Rep. 400.

assignees under the Insolvent Act, notwithstanding the provision to the contrary in the will by which the trust was created, Knight-Bruce, V. C., observing, "There is no clause of forfeiture, no clause of cession, no limitation over. It is merely a wordy trust for the benefit of the insolvent, attempted to be guarded from alienation, but vainly and ineffectually."

The foregoing decisions go clearly to explain that a condition which is repugnant to the incidents of alienation will not preserve an estate to the donee despite his voluntary acts or involuntary misfortunes. Note, however, the provision of section 12 of the Transfer of Property Act:—"*Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to, or for the benefit of any person, case on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.*" It should be observed that the distinction which the Courts in England have sometimes endeavoured to draw between a condition subsequent and a limitation in such cases seems to have been dispensed with in the Indian Act. Upon reference to *Brandon* v. *Robinson* we find these words of Lord Eldon:—"There is no doubt that property may be given to a man until he shall become bankrupt; but a disposition to a man until he shall become bankrupt and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a *proviso* that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life-estate, neither the man nor the assignees can have it beyond the period limited." I will give an illustration: where a gift of an estate is made to A for life, but to cease upon his attempting to transfer the estate or upon his bankruptcy, the clause as to cesser will be treated as a nullity; if, however, the clause as to cesser was thus worded, "but upon his attempting to transfer or upon his bankruptcy to cease and go over to B," the clause would hold good. The distinction here made between a mere condition and a condition which will amount to a limitation is far too nice. It is sometimes difficult to reconcile the English authorities on this point. Compare the principle of decision in *Hunt-Foulston* v. *Furber*[1] with the ruling in *Hatton* v. *May*.[2] In *Hatton* v. *May* a testator directed his trustees to purchase out of his residuary estate from Government an annuity for M, a single woman, who was not to be entitled to elect to receive the price or value of the annuity in lieu thereof, and he directed such annuity to be paid to her for her separate use, and that if she should at any time sell, assign, incumber or in any wise dispose of, or anticipate such annuity, or any part thereof, the same should cease, and be void, and should sink into the residue; and it was held that M was not entitled to the value of the annuity, but that the annuity was to be purchased by the trustees, and held by them to pay to M until he should do any act of alienation.

[1] L. R., 3 Ch. D 285. [2] *Ibid*, 148.

It may be well to refer to the definition of LIMITATION and CONDITION in Sheppard's Touchstone :—" Where a clause stays or suspends the estate or rather the gift, and makes it uncertain whether the gift shall take effect or not, that clause is properly a limitation, and denominated sometimes a conditional limitation and sometimes a limitation on a contingency ; whatever provisions creates or enlarges an estate on a certain or an uncertain event is of necessity a limitation. That clause only is a condition which is to defeat the estate after it has been created or enlarged." The terms CONDITION and LIMITATION are nowhere defined in the Indian Act ; but it would appear that any provision with respect to a restraint on alienation whether it be in the nature of a limitation or that of a condition, as understood in the English law, will have the same effect under the Indian Law of Transfer, and whether there is a gift over or not, any condition or limitation of which the object is to make an interest determinable on insolvency or attempted alienation, is void. This is made clear by the provision of section 31 of the Transfer of Property Act :—*subject to the provision of section 12*, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen." There is an illustration under the section :—" A transfers a farm to B for his life with a proviso that in case B cuts down a certain wood, the transfer shall cease to have any effect, B cuts down the wood. He loses his life-interest in the farm." Now, if the proviso in the illustration were, that in case B attempted to alienate the estate or became a bankrupt, the transfer would cease to have any effect, the life-estate would, notwithstanding his attempted alienation or bankruptcy, pass to his transferee or his assignee for the benefit of his creditors. The modification of the English rule is further emphasized by section 28 of the Act which, while it allows that " on a transfer of property an interest therein may be created to accrue to any person with the condition superadded, that in case a specified uncertain event shall happen, such interest shall pass to another person or that in case a specified uncertain event shall not happen, such interest shall pass to another person," at the same time renders such disposition subject, amongst others, to the rules contained in sections 10 and 12.

[It should be observed that in English law where an estate in fee is given to a person as there can be no remainder over, the estate will not cease even in case of a gift to another, when the condition annexed to the absolute estate is inconsistent with the incidents or nature of the estate.[1] Nor is a gift over essential in every case to the divesting af an estate.[2]]

[1] See Kumar Asima Krishna Deb, 2 B. L. R., 2 O. C. J., pp. 27, and 28, and the cases discussed there.

[2] Stokes's Ind. Suc. Act., s. 121, note. *Bacchus* v. *Gilbee*, 9, Jurist, N. S., 228. In *Carte* v. *Carte*, (3 Atkyns. 180) it was said by Lord Hardwicke that a gift over in case the devisee in fee commits treason within a given number of years would be void.

The condition or limitation in restraint of alienation, whether voluntary or involuntary, is, however, allowed to prevail in certain cases. Note the provisions or exceptions in sections 10 and 12 of the Transfer of Property Act. It is laid down in section 10 that a condition or limitation in restraint of alienation is void, "except in the case of a lease where the condition is for the benefit of the lessor, or those claiming under him, provided that property may be transferred to, or for the benefit of a woman (not being a Mahomedan, Hindu or Buddhist) so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein." The exception to section 12 is in these words:—"Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him." The principle with regard to lessees is fully explained in *Hunter* v. *Galliers*.[1] There the conditions in the lease, amongst others, were in these terms:—"* * or if the said lessor, his executors or administrators shall assign over the indenture of lease, or assign or let the premises thereby demised, or any part thereof, to any person whatsoever for any time or times whatsoever, without the license or consent of the said lessor, his heirs and assigns first had or obtained in writing under his or their hands for that purpose, or if the said lessee, his executors or administrators shall commit any act of bankruptcy within the intent and meaning of any statutes made or to be made in relation to bankrupts, whereon a commission shall issue, and he or they shall be found or declared to be a bankrupt, or bankrupts, that then and from thenceforth in any of these cases it shall and may be lawful to and for the said lessor, his heirs and assigns into the said demised premises to re-enter, and the same again to have, repossess and enjoy, as in his or their former estate anything therein contained to the contrary notwithstanding. The lessee afterwards became bankrupt, and the defendants entered into the premises and were possessed as assignees under the commission of bankruptcy. The question arose, Whether a proviso in a lease, that if the lessee commit an act of bankruptcy, or, in other words, do any of those acts upon which a commission of bankruptcy may be sued out, the landlord shall have a right to re-enter, be legal or not? ASHHURST, J., there observed: "The general principle is clear that the landlord, having the *jus disponedi*, may annex whatever condition he pleases to his grant, provided they be not illegal or unreasonable. * * * First it is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant, therefore, not to assign is legal. * * The landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment, or by an act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally rea-

[1] 2 T. R. 143.

sonable for him to guard against such an event as the present * * Neither is there any reason of public policy to be urged against allowing such a proviso. It conduces to the security of landlords, which can never be urged as a ground of objection on that head." The ground of inconvenience which was urged in that case against the proviso was thus met by BULLER, J. :—"This case has also been argued on general principles of inconvenience, because the possession of an estate on such terms enables tenants to hold out false colours to the world. But that sort of observation does not apply to the case of land: for a creditor would not rely on the bare possession of the land by the occupier, unless he knew what interest he had in it. If he were desirous of knowing that, he must look into the lease itself; and there he would find the proviso that the tenant's interest would be forfeited in case of bankruptcy."

On the subject of the proviso that property may be transferred to, or for the benefit of a woman of other than Hindu, Mahomedan or Buddhistic persuasion so that she shall not have power during the marriage to transfer or charge the same or her beneficial interest therein, it will be necessary to say a few words. In primitive times the position of women was one of unmitigated servitude, and a married woman was by no means an exception to the rule. Under the ancient Brahmanic as well as under the old Roman law, a woman had scarcely an independent existence, and all that a woman possessed passed with her person to her husband or lord. The Roman term *manus* is fully expressive of the absolute marital power.[1] The position of the wife in relation to the husband was identical with the position of a daughter under the *patria potestas.* Here is what we read in a passage of Manu :—"Three persons, a wife, a son and a slave are declared by law to have no wealth exclusively their own; the wealth which they may earn is acquired for the man, to whom they belong."[2] In course of time the husband's control was slowly unfastened, and in the Roman law the institution of *dos* or dower came by degrees to supply the place of the *manus.*[3] *Dos* is defined to be the property contributed by a wife or by any one else on her behalf to her husband to enable him to support the expenses of the marriage.[4] At first the power of the husband over the *dos* was unlimited. This despotic power was considerably reduced by the *Lex Julia,* and at last we find Justinian thus laying down the rule: —"The husband is prohibited by the *Lex Julia* from alienating immoveables which form part of the *dos* against the will of the wife, although these im-

[1] Ortolan. Tom. 2, p. 119. Hunter's Roman Law. Note, also, this passage in *La Cite Antique,* p. 360, "*que la femme était soumise sans réserve au mari et que le droit de celui-ci allait jusqu' à pouvoir l'aliéner et la vendre*"

[2] Manu c. 8, v. 416. भार्य्यापुत्रश्च दासश्च त्रयएवाधनाः स्मृताः। यत्तेसमधिगच्छन्ति यस्य वै तस्य तद्धनं।

[3] D. 23, 5, *De Fundo Dotali.*

[4] Hunter's Roman Law, 150.

moveables, having been given her as a part of the *dos*, belong to him. We have amended the *Lex Julia* and introduced a great improvement. This law only applied to Italian immoveables, and it prohibited alienations made against the wishes of the wife, and mortgages made even with her consent. Wishing to amend the law on each of the points, we have declared that the prohibition of alienation or mortgage shall extend to immoveables in the provinces, and that neither alienation nor mortgage shall be made even with the consent of the wife, lest the weakness of the female sex should be abused to the detriment of their fortunes (*ne sexus muliebris fragilitas in perniciem substantiæ earum converteretur*).[1] Similarly, under the Brahmanic law, the position of women was by degrees so thoroughly improved that under the denomination of "married woman's property" (स्त्रीधनं), the husband was absolutely excluded from any share in or control over it.[2] Note a passage in Manu with Kulluka's gloss thereon:—"Whoever under the influence of blind avarice, robs a woman of her substance, be he husband or father, shall be hurled down to the lowest abyss."[3] Kulluka in his commentary further points out that the wife has a dominion over the property of her husband.[4]

Among the ancient Arabs, women were mere ciphers in the eye of the law. It was not until the time of Islam that they attained a separate individuality, and although the Sunni law allows the husband, after the manner of the common law of England and the civil law,[5] a moderate power of correction over a refractory wife, still it is clear that under that law the status of marriage does not give rise to any disabilities with regard to the wife's proprietary rights. She is for all purposes regarded as a *feme sole*. Marriage like other contracts is constituted by *ijáb wa qabul*, or declaration and acceptance, but confers no right on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same power as before of using and disposing of her property and of entering into all contracts regarding it.[6] True, a marriage may be valid although no mention be made of an antenuptial gift by the husband.[7] Nevertheless, it is an essential feature of the Mussulman law,

[1] Sandar's Justinian Líb., 2, Tit., 8.

[2] Manu c. 3, v. 194.

[3] Manu c. 9, v. 52:—स्त्रीधनानि तु ये मोहादुपजीवन्ति बान्धवाः । नारी यानानि वस्त्रं वा ते पापा यान्त्यधोगतिं । Kulluka explains बान्धवाः as husband &c. See Pundit Bharat Chandra Siromoni's Institutes of Manu, p. 125, note.

[4] Bharat Chandra Siromoni's Institutes of *Manu*, p. 417. COMPARE the doctrine of *communio bonorum* which, under the Roman law, recognized in the wife a right to share in her husband's property

[5] 2 Steph. Com., 277. Cf. "*Modicam castigationem adhibere.*"

[6] Ameer Ali's Personal Law of the Mahommedans.

[7] Hamilton's Hidaya, 44.

founded, it would appear, on the precepts of the wise, that in every marriage contract there should be a provision made by the husband for a nuptial gift to the wife. This provision is known under the name of *mahr* (dower). The amount of this dower may vary, but it attaches a sort of lien on the whole property of the husband. The effect of it is to throw the husband to some extent under the power of the wife,[1] and the provision may not improperly be compared to a recognizance or bond for good behaviour on the part of the husband.

Under the common law of England, the wife's personality is regarded as merged in that of the husband. The general rule is that when a woman marries, her property, subject to certain conditions, passes to the husband. Even all freeholds of which the wife is seised at the time of the marriage or afterwards are by law vested in the husband and wife, during the coverture, in right of the wife. During their joint lives, the husband is entitled to the profits, and has the sole control and management; but he cannot convey or charge the lands for any longer period than while his own interest continues. While, however, the law thus divested the wife of her property in favour of the husband, it gave her some compensation in the shape of dower which consisted in allowing the wife in the event of her surviving her husband to enjoy for the term of her natural life a third part of all the lands and tenements of which the husband may have any time been seised during the coverture.[2] In the midst of this state of affairs, equity began to interfere, and the Court of Chancery proceeded to give relief to the wife against the husband or his assigns in matters within its jurisdiction. This relief obtained the name of the married woman's "equity to a settlement." In *Jewson* v. *Moulson*,[3] LORD HARDWICKE is reported to have said "that the rule that the husband cannot come into this Court for the fortune of his wife without making a provision for her in the first place, is, in equity, grounded upon natural justice." In *Oswell* v. *Probert*,[4] the husband having become bankrupt, LORD ROSSLYN said, "where persons claiming in right of the husband are obliged to come into an equitable jurisdiction to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve. Whatever the husband takes in right of his wife, is, in itself, a provision for the maintenance of both." In *Mitford* v. *Mitford*,[5] GRANT, M. R., observed: "It is upon the ground that the assignees want its (the Court's) assistance to reduce the property into possession, that this Court imposes upon them the condition in which alone it would have assisted the husband to obtain possession." The same learned

[1] Hamilton's Hidaya.
[2] 2 Steph. Com. 81.
[3] 2 Atk. 417.
[4] 2 Ves. 682.
[5] 3 Ves. 168.

Judge said, in *Wright* v. *Morley*;[1] the argument that the equity of the wife did not extend to the case of a life-interest, upon the principle that the husband becomes absolute purchaser of that upon the marriage, in consequence of the obligation to maintain his wife thereby contracted, is of no avail; the life interest passes to the assignees, subject to the ordinary equity for a settlement." In *Sturgis* v. *Champneys*,[2] which is a leading case on the point, Lord Cottenham observed:—"It appears that the equity which this Court administers in securing a provision and maintenance for the wife is founded upon the well-known rule of compelling a party *who seeks equity to do equity.* * * The common law gives to the husband the enjoyment of the life-estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life-estate be attainable by the husband or his assignee *at law*, the security of the law must prevail; but if it cannot be reached otherwise than by the intervention of this Court, equity though it follows the law, and therefore gives to the husband or his assignee the life-estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence; it refuses to hand over to the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both."

The Courts also found another and a more powerful method for the protection of the interests of a married woman. That method was, the recognition of a married woman's separate property independent of the legal control of the husband. The purpose of securing to the wife her interest in property was effectuated by means of ante-nuptial or post-nuptial agreements with the husband or the intended husband, whereby the latter consented that the wife or the intended wife should, during coverture, hold her own property separate from the husband, or to her own proper use. Also, any property that may come to the wife during coverture in the form of a gift from a stranger was *ipso facto* considered to be for her separate use. Moreover, the wife is entitled to hold all the property independently of the husband, when given to her, whether before or after marriage by devise, or otherwise, upon express terms that she should hold such property to her own separate use.

In *Pybus* v. *Smith*,[3] a feme covert, having a settlement of a real estate, and money in the funds, the rents and dividends to be paid *to her*, and as she should from time to time direct, with a contingent remainder on failure of issue to herself, conveyed the whole jointly with her husband as a security for the husband's debts. It was HELD that the conveyance must be carried into execution by a Court of Equity. Lord Thurlow there observed:—"A feme covert

[17] 11 Ves. 12

[18] 5 My. and Cr., 105.

[1] 3 Bro. Chancery Cases. 339.

had been considered by the Court with respect to her separate property as a feme sole. * * If a feme covert sees what she is about, the Court allows of her alienation of her separate property." The result of the recognition of this separate estate in a married woman, it should be noted, was that a married woman was in course of time considered for all purposes as a feme sole, in respect of her separate property, and was placed on the same footing in the matter of enjoyment or disposition of the property as any person *sui juris*. It was soon discovered, however, that while equity thus far liberated the wife from the manus of the husband, it wholly failed to protect her from the influence of an improvident or extravagent husband; and although the principal object of the institution of the separate estate was to protect the property from the creditors of the husband, the wife was found but too frequently to yield to the advice of a thoughtless self-seeking husband, and thereby sacrifice her proprietary interests for the benefit of his creditors. This was apparent in *Pybus* v. *Smith*. In that case, we read in the Reporter's note, Lord Thurlow had a most curious desire to find any principle of a Court of Equity strong enough to protect the property against the improvident act of the wife in joining her husband in a conveyance of her separate estate as a security for her husband's debts. Lord Thurlow there suggested that such improvident acts might be prevented in future by the introduction of words positively restrictive of any such sweeping alienation, and for the first time tried the experiment in the settlement of Miss Watson, wherein he himself was a trustee. In 1817, Lord Eldon, after alluding to this circumstance, is found to state that "Lord Alvanley who followed Lord Thurlow, thought it a valid clause, and so it has remained ever since." The key-note of such a provision was struck in *Pybus* v. *Smith*, where in allowing the validity of the conveyance, Lord Thurlow added; "But if it was the intention of a parent to give a provision to a child in such a way that she could alienate it, he saw no objection to its being done; but such intention must be expressed in clear terms." This is the origin of the "restraint on anticipation," or restraint on alienation of her separate property by a married woman during coverture. The reason of such a provision in fully explained in *Rennie* v. *Ritchie*.[1] Lord Cottenham there observed: "When first by the law of this country, property was entrusted to the separate use of the wife, equity considered the wife as a *feme sole* to the extent of having a dominion over the property. But then it was found that, though useful and operative so far as securing to her a dominion over the property so devoted to her support, it was open to this difficulty, that she being considered as a *feme sole* was, of course, at liberty to dispose of it as a *feme sole* might have disposed of it, and that, of course, exposing her to the influence of her husband, was found to destroy the object of giving her

[1] 12 Cl. and Fin. 234.

a separate property. Therefore to meet that, a provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payments actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women. In Scotland much the same course is adopted, the same objects have been worked out, though not precisely in the same way; but still there is by the law of Scotland a protection in favour of an alimentary fund; and there is provision that the aliementary fund shall not be assignable." The argument in *Scarborough* v. *Borman*[1] is well worthy of consideration. "By the old common law," it was there said, "all the property, real and personal, of the wife was not by any contract, actual or supposed, between the parties, but by the general policy of the law, submitted to the control of the husband. In process of time, the policy of the old law was found to be in its strictness very inconvenient, after property had so much increased, and after the modifications of property had become so much more numerous and varied. The policy of the law in giving the wife a separate interest in property, was to secure her against the extravagance or improper influence of the husband; but the vesting such property in trustees for her separate use was found insufficient for the purpose, and it was not until after a considerable struggle that the object was fully attained; but attained it ultimately was by the aid of Lord Thurlow; not in the first instance by means of a judicial decision, but by means of restrictive words inserted in a settlement in which he was himself a trustee, namely, the restriction against anticipation, the great value of which had been suggested to him by the case of *Pybus* v. *Smith*." The Lord Chancellor further said, "When this Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation." The object of the clause against anticipation in settlements is to restrict the ownership of the woman to the profits of the property as they accrue from time to time without the power of interfering with the corpus or the future produce thereof. But the prohibition against alienation has been repeatedly held to operate only during coverture; for the spirit of the law being opposed to any restraint against alienation, the restraint will be dissolved the moment the reason for it has ceased. In *Burton* v. *Briscoe*,[2] the Master of the Rolls

[1] 4 My. and Cr. 378.

[2] Jacob's Rep. 603.

observed that "restraints may be imposed on the alienation of separate property is now settled more upon authority than principle, beginning with what was done by Lord Thurlow in the case of Miss Watson's settlement. At that time, however, there was considerable doubt about it, for if a *feme covert* is permitted to hold separate property in the same manner as if she were a *feme sole*, it would seem that it ought in equity to have those incidents which all other property has. It is difficult to conceive how they can be taken away from it, particularly when it is remembered, that the protection which Courts of equity afford to married women with respect to their property not in settlement, they may if they please give up. Why, then, should a larger protection be extended as to that over which a power of disposition is given them? It is, however, too late to doubt the validity of these restraints: the question is, whether they must not be confined to the coverture. The power over separate property being a creature of equity, it is said that equity may modify that power; that reasoning, however, only applies during the coverture. When the married woman becomes discovert, she has the same power over her property as other persons: the restraint, therefore, ought not to continue. The attempt to impose upon the power of alienation a fetter unknown to the Common Law of England may be permitted to the extent to which that power is created by equity, but no further; when the coverture is gone, the reason on which the restraint is founded no longer exists." In *Jones* v. *Salter*,[1] a bequest was made of dividends of stock to a *feme covert* for life not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments. It was there HELD that the legatee, on becoming discovert, might validly dispose of her entire life-estate.

The Married Woman's Property Act, or 45 and 46 Vict. c. 75, has consolidated, and even given a large extension to, the equitable doctrines of separate estate.[2] Under that statute, a married woman is capable of acquiring, holding, and disposing by will or otherwise of property of any kind which belongs to her either before or after marriage as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.[3] Section 19 of the statute, however, saves all existing and future settlements, and the restriction against anticipation.

The British Indian law on the subject is precisely on the same footing as the present English law. The Indian Succession Act[4] enacts that "no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done, if unmarried."[5]

[1] 2 Russ and My. 208. [2] *Cahill* v. *Cahill*. 2 App. Cases, 426. [3] S. 1, Sub-section 1.
[4] Act X of 1865, s. 4. [5] See, *Harris* v. *Koylashchandra Bandopadia*, I. L. R., 1 Cal., 285.

Act III of 1874, which is "The Married Woman's Property Act" for British India, emphasizes the provision of the Succession Act, and renders the husband and wife independent of each other in the matter of debts, obligations and suits. But, while the British-Indian law acknowledges to the fullest extent the separate estate of a married woman, it has extended its protection to a married woman against the influence of a thoughtless or extravagant husband by providing that the power of alienation, which in modern times is an inseparable incident of ownership, may be restricted or taken away in respect of the separate property of a woman during her coverture, with or without the intervention of trustees. This is the only instance, it should be remembered, in which the English law with its almost sensitive regard for the freedom of alienation will, nevertheless, allow fetters to be imposed on the enjoyment of property "And although," in the words of Lord Brougham,[1] "no warrant can be found for the proposition that at law an inalienable estate can be created without any gift over, yet where property is given to a married woman to her sole and separate use, alienation may be prohibited in respect of the property so settled, without any limitation over, to operate by way of defeasance of the first estate. The Indian Transfer of Property Act,[2] while it scrupulously guards against any limitation or condition in restraint of alienation, entirely follows the English law on the subject of restraint against anticipation in relation to a married woman's separate estate.

Closely related to conditions in restraint of alienation are the provisions which refer to restrictions repugnant to the interest created on a transfer of property. These and other provisions are treated in the Transfer of Property Act as corollaries to the rule which prohibits conditions in restraint of alienation. Section 11 of the Act is in these terms:—"Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction." Compare the provision in section 125 of the Indian Succession Act which runs thus:—"Where a fund is bequeathed absolutely to, or for the benefit of, any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction." The case of *Stokes* v. *Cheek*,[3] will illustrate the foregoing section. There a testatrix having directed annuities to be purchased for several persons, declared by her will that no one of the annuitants therein beforenamed should be, nor should the executors or administrators of any of them be allowed to accept the

[1] *Woodmeston* v. *Walker*, 2 Russ and My. 204.

[2] S. 10.

[3] 29 L. J. Chancery. 922.

value of the annuity to which he or she respectively was entitled in lieu thereof. Romilly, M. R. in directing that the annuitant was, notwithstanding such declaration, entitled to receive such a sum of money as the annuity would have cost if purchased, observed: "It is useless for me to direct a purchase if the annuity is immediately to be sold again." In other words, Equity will not enforce the doing of a thing which may be undone the next moment.

Note, however, the exception to the rule in section 11, "nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner." In *Tulk* v. *Moxhay*,[1] the plaintiff, being then the owner in fee of the vacant piece of ground in *Leicester Square*, as well as of several of the houses forming the Square, sold the piece of ground by the description of "*Leicester Square* Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one *Elms* in fee: and the deed of conveyance contained a covenant by *Elms*, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors and administrators, "that *Elms*, his heirs, and assigns should, and would from time to time, and at all times hereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of *Leicester Square*, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground." The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor; but he admitted that he had purchased with notice of the covenant in the earliest deed. The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed a bill for an injunction, and an injunction was granted by the Magistrate of Rolls, to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square Garden and Pleasure Ground in an open state and uncovered with buildings. On a motion to discharge the order, Lord Cottenham sustained the rule observing, "but this Court has jurisdiction to enforce a contract between the owner of land and his neighbour

[1] 2 Ph. 774.

purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract: the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this Court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless."

The regard of law for freedom of transfer has given rise to a variety of rules which are like so many corollaries to the main proposition which prohibits conditions in restraint of alienation. The rule against perpetuity, as it is called, is one of those rules. One of the causes which, according to Bentham, operates to maintain restraints upon alienation is family pride, "joined to that agreeable illusion, which paints the successive existence of our descendants as the prolongation of our own; the imagination is not satisfied with the idea of leaving our children the same value; they must possess the same lands, the same houses, the same natural objects; this continuity of possession appears a continuity of enjoyment, and gives support to a feeling chimerical and absurd."[1] It was said in the course of argument in a celebrated case that "law abhors a perpetuity as nature abhors a vaccuum." The result of a perpetuity is to take property out of commerce, and to permit such a course has been deemed to be against the policy of modern law. It was said in *Duke of Norfolk* v. *Howard*,[2] some two centuries ago, that "a perpetuity is a thing odious in law, and destructive to the Commonwealth; it would put a stop to commerce and prevent the circulation of the riches of the kingdom; and is, therefore, not to be countenanced in equity; if in equity you should come nearer to a perpetuity, than the rules of Common Law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might make well for the jurisdiction of the Court, but would be destructive to the Commonwealth." In 1757, Lord Mansfield thus observed in *Taylor* v. *Horde*[3]:—"The sense of wise men, and the general bent of the people in this country have ever been against making land perpetually inalienable. The utility of the end was thought to justify any means to attain it. Nothing could be more agreeable to the law of tenures than a male fee unalienable; but this bent "to set property free" allowed the donee after a son was born to destroy the limitation; and break the condition of his investiture. No sooner had the *statute de donis*

[1] Bentham's Theory of Legislation. 175.

[2] 1 Vern. Rep. 164.

[3] 1 Burr. 115.

repeated what the law of tenures said before "that the tenure of the grant should be observed" than the same bent permitted tenant-in-tail of the freehold and inheritance to make an alienation, *voidable* only under the name of a *discontinuance*; but this was a small relief. At last the people having groaned for two hundred years under the inconvenience of so much property being unalienable, and the great men to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature—the same bent threw out a fiction in Taltarum's case, by which, tenant-in-tail of the freehold and inheritance with the consent of the freeholder might alien absolutely. Public utility adopted and gave a sanction to the doctrine, for the political reason "to break entails;" but the ostensible reason "for the fictitious recompense" hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. Till at last the legislature applauded Common Recoveries, and lent its aid by the Acts of 11 Hen. 7, c. 20, 33 Hen. 8, c. 31, 34 and 35 Hen. 8, c. 20, 14 Eliz., c. 8 and lately 14 Geo. 2, c. 20. As the legislature has for ages avowed the proposition; we may now say "that common recoveries are a mere form of conveyance." All necessary circumstances of form and ceremony are taken from its fictitious original. The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property. Alienation was allowed, yet in such a shape as necessarily allowed deliberation and delay; and they were only allowed to be made by tenant-in-tail in possession or by tenant-in-tail in remainder, with consent of the owner of the first estate for life."

The rule against perpetuity in its widest form imposes a kind of restraint on the power of the transferor, and prevents him from postponing the acquisition of the absolute interest in, or dominion over transferable property beyond a certain period. It affects both executory interests and interests created by way of remainder.[1] In *Duugannon* v. *Smith*,[2] Lord Campbell observed:—"The rule that a bequest of property must vest, if at all, within a life or lives in being and twenty-one years afterwards, and the period of gestation is fully admitted." The Transfer of Property Act,[3] substantially follows this rule and lays down:—"No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, *and* the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age, the interest created is to belong." This is a reproduction with slight verbal alteration of section 101 of the Indian Succession Act, which runs in these terms: "No bequest is valid whereby the vesting of the thing be-

[1] Lewis on Perpetuities, 164.

[2] 12 Cl. and Fin. 546.

[3] Section 14.

queathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age, the thing bequeathed is to belong." The illustration to section 101 sufficiently explains the rule, namely, "a fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B, and the vesting of the land may thus be delayed beyond the lifetime of A and B *and* the minority of the sons of B. The bequest after B's death is void." It will be seen at a glance that for the period of 21 years in English law, one has to read "the minority of some person" in the Indian Act, which consists of the period of "18 years" under the Indian Majority Act.

In Dungannon's case, just cited, a testator bequeathed his property to the trustees upon the trust and in the words following:—"In trust to permit my said grandson, Arthur Trevor, and his assigns to take the same leasehold premises, for and during the term of his natural life, and from and after his decease to permit such person who for the time being could take by descent as heir male of the body of the said Arthur Trevor, my grandson, to take the profits thereof until some such person shall attain the age of twenty-one years and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators and assigns;[1] but if no such person shall live to attain the age of twenty-one years, then in trust to permit such person or persons successively who for the time would take by descent as heir male of the body of my son, the father of Arthur, the grandson, to take the profits of the same leasehold premises until one of them shall attain the age of twenty-one years, and then to convey the same to such heir male first attaining that age, his executors, administrators and assigns." At the death of the grandson, his son and heir had attained the age of twenty-one and entered into possession of the leasehold premises. Upon a bill filed against him by the next-of-kin of the testator, it was HELD that the son of the grandson had not good title to the leaseholds, and that the bequest to the heir male of the grandson attaining the age of majority was void for remoteness. It was clear that in this case the bequest might not have taken effect within 21 years after the death of the life-tenant, and that was held to be fatal to the devise after the life-estate of the grandson. "In deciding the case of remoteness," in the words of a learned writer

[1] Assigns are persons who by some act amounting to alienation or forfeiture on the part of the owner, or by the operation of law as in the event of death, possess a thing or enjoy a benefit. Under the term "assigns" is included the assignee of an assignee *in perpetuum*.

on wills,[1] "it is an invariable principle that regard is had to possible and not to actual events, and the fact that the gift might have included objects too remote is fatal to its validity." For the clear and settled rule of law is that the validity of an executory bequest must be determined at the testator's death, and that if there be then any possibility of the period of vesting absolutely exceeding the allowed limit, the executory bequest is void, and according to all the cases, it is void not in the excess only, but absolutely.[2] Connected with Rule 14 in the Act is another which is in these terms[3]:—"where on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."[4] The object here is to prohibit the creation of successive life interests.

Dependent upon Rules 13 and 14 of the Act is the rule contained in section 15 which relates to transfers to a class. That rule is to this effect: "If on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class," or all the individuals of the class.[5] In *Leake* v. *Robinson*,[6] the testator after making various provisions thus proceeded "and in case W. R. R. shall die without leaving issue living at the time of his death, or leaving such, and all die before twenty-five, upon trust to pay unto and among all and every the brothers and sisters of W. R. R. share and share alike, upon their attainment of twenty-five, or marriage respectively." It was HELD that the limitation to the brothers and sisters of W. R. R. in default of issue living to attain twenty-five, was intended to include all his brothers and sisters living at his death, and was consequently void for remoteness. Grant, M. R. thus observed:—"To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, *viz.*, a series of particular legacies to particular individuals."

In *Porter* v. *Fox*,[7] a testator gave annuities to his widow and son, and directed the surplus of his Personal estate and the rents of his Real estate to be

[1] Jarman on Wills, 3rd edition, vol. 1, p. 252.
[2] See Argument in Dungannon's case.
[3] S. 13.
[4] Compare section 100 of the Indian Succession Act.
[5] Compare, I. S. Act, section 102.
[6] 2 Mer. Rep., 364. Decided in 1817.
[7] 6 Simons Rep., 485.

invested in stock, and the dividends to be accumulated, and to be and remain assets for improvement, in the hands of his executors, until the time or times should arrive when distribution should be made, as thereby directed. The testator then directed his Real estates to be sold after the decease of the survivor of his wife and son, and the proceeds to be invested in stock, and the dividends to be accumulated, to be and remain assets for improvement in the hands of his executors, for the benefit of his grandchildren and his nephew T. O. and to be distributed as they should become of the age of 25 years. The testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime and the other after his death. Another grandchild was born after his death who was an infant when the Bill was filed. T. O. survived the testator and attained 25. It was HELD that the bequest was void for remoteness. The Vice-Chancellor there observed :—" What the testator meant was that the right of each child should depend on there being a class formed, and that the first member of that class who attained 25, should take a share, the amount of which should be determined by the number of individuals then constituting the class. The testator has directed such a distribution to take place, amongst a class of persons as the law will not allow. If the whole of his intention cannot prevail, effect cannot be given to any part of it. It would be inconsistent with that intention to allow Thomas Owen to take a third share of the fund; for the testator meant every person's share to be determined by the number of the class, consisting of his grandchildren and Thomas Owen, who should be living when he first attained 25."

In *Bentinck* v. *Duke of Portland*,[1] a testatrix (Lady Mary Bentinck) made a bequest in trust for such of her four nephews and neices as should be living at the expiration of twelve months after the death of their mother (Lady Charles Bentinck) and the issue then living, who should attain the age of twenty-one years, of any of the nephews and neices who should have died before the expiration of the twelve months. HELD, on the construction of the will, that there was no period of distribution fixed except by the gift to the class; and that, as the members of the class might not be ascertained until after the expiration of more than twenty-one years from the death of the mother, the whole bequest failed. Fry, J. there said " Where there is a time fixed at which a fund is to be divided into separate shares, and that time is not obnoxious to the rule against perpetuities, then, as I conceive, each share stands separate from the other's and will take effect or not according as the dispositions of that share do or do not violate the rule against perpetuities; and I conceive it to follow that the valid gift of one share will not be made void by the invalid gift of another share. Further, I conceive it to be clear from the authorities that the case is

[1] L. R., 7 Ch D., 698, 699.

quite different where the gift is what is called a class gift; and I conceive that it is a class gift where the total or ultimate amount of the share to be taken by any one donee cannot be ascertained until all the persons who are to take, and the ultimate portions in which they are to take, are finally ascertained. * * * * The inquiry then remains, whether some of that class are not to be ascertained at a period beyond that which is prescribed by the rule against perpetuities. It is clear that they are, because a grandchild of *Lady Charles Bentinck*, being a member of the class, may attain the age of twenty-one at a period beyond the lifetime of the testatrix, or of Lady Charles Bentinck or twenty-one years afterwards. I am therefore bound to hold that there is no independent period of distribution here fixed; but that the period is to be ascertained from the class; that the class includes persons who may not satisfy the requirements of the rule against perpetuities, and consequently that the distribution cannot take effect within a period not obnoxious to the rule, and that the gift is void." The rule contained in section 16 of the Transfer of Property Act is a natural sequel to the provisions of the three preceding sections, and is dependent upon them. That section says that "where an interest fails by reason of any of the rules contained in sections 13, 14 and 15, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest, also fails." All these rules deal with what are called executory interests in English law, and the cases which have just been cited as illustrative of these rules, although taken from executory bequests, do by no means differ in principle from gifts *inter vivos*. The one set of gifts is made by will; while the other is made by a deed or non-testamentary written instrument. The donor in one case is the testator, while in the other case he is generally called the settlor. Executory interests are interests in property which are to take effect in some future time, and when they form the objects of a marriage settlement, or family arrangements, are the appropriate subject of the Transfer of Property Act. On principle, it matters little whether a testator by his will provides that after his death his eldest son will take an estate for life in his zemindari, and after him his eldest son for life, and then absolutely to the right heirs of the latter, or a settlor conveys his zemindari to the use of his eldest son upon his marriage for life, and after him to his eldest son for life, and then to the right heirs of the latter. The estates or interests thus created are all *in fieri*, that is to say, to take effect at some future time. The law has fixed a limit to the creation of such gifts, and to prevent the tying up of property beyond a certain time, it has, indeed, gone the length of laying down, as has been already observed, that even if the intended gift might, in the actual event, fall within the prescribed limit, yet it would be regarded as absolutely void if the event could by possibility have occurred at a time which would have taken it beyond the legal boundary.

It will be useful to consult the case of *Krishnaramani Dasi* v. *Anand krishna Bose.*[1] There the testator in his will provided, among other things, that "with respect to accumulations of money in the hands of the executors and trustees, I direct that the same be converted into such Government or other securities as to the executors and trustees may seem best: and that the interest and produce of such securities be accumulated and in like manner invested, and that when, and so soon as the aggregate thereof shall amount to rupees three hundred thousand, that it be transferred to, and divided among my sons or the survivor or survivors, together with the descendants of such of them as may be deceased, *per stirpes;* and as soon as new accumulations arise in the hands of the executors and trustees, that the same be again in like manner divided among my sons then living, or the survivor of their descendants, as before, and so on from time to time." Peacock, C. J. upon this observed:[2] The devise in this clause is clearly an attempt to do that indirectly by the intervention of trustees which could not have been done directly by means of a devise to the sons and their descendants, or in any other manner. If the devise had been to the sons and their heirs or descendants, on condition that they and their descendants for all time should accumulate the rents and the profits of the estate until such rents and profits should aggregate three lakhs or any other certain amount, and should then divide the accumulations amongst themselves or their heirs or descendants for the time being, it would, in my opinion, have been repugnant and void. If a direction to accumulate up to three lakhs would be good, there is no reason why a similar direction to accumulate to two hundred lakhs or twenty crores before division, should not also be good. The devise also appears to be bad upon the ground that the divisions were to be made among persons unborn at the time of the testator's death, and also upon the ground of uncertainty, it being impossible to ascertain at the time of the testator's death who would be entitled to participate in the several divisions of accumulations directed to be made. There is no knowing when the accumulation would become sufficiently large to be divisible under the will, or whether the persons to take were in existence or not at the time of the death of the testator. In short, the devise was to provide for a succession of devisees for all time. If the sons should all be living when the first accumulation should aggregate three lakhs, that accumulation was to be divided amongst them; but if they or any of them should demise, it was to go to his or their descendants *per stirpes.* It is impossible even to say within what degree of relationship the descendants of any deceased son would be when the time for division might arrive. It is evident that the descendants who were intended to take under the subsequent divisions of the accumulations which were intended to be perpetual, will be very remote when the time for the last

[1] 14 B. L. R. O. C. J., 231. [2] P. 277.

division arrives, if it ever should arrive. I, therefore, argue that the clause is bad in point of law, and that the general scheme of the will fails altogether." Note, here, section 18 of the Transfer of Property Act. "Where," that section says, "the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed." A distinction, however, appears to have been made (*a*) where the property is immoveable and (*b*) where accumulation is directed to be made from the date of the transfer. In either case the direction for accumulation will be valid "in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed."

In *Kumar Asima Krishna Deb* v. *Kumar Kumar Krishna Deb*,[1] the testator gave the residue of the property to the grandson and his successors upon trust that the profits of the estate were not to be beneficially used during a period of 99 years, but were to be laid out in the purchase of fresh estates and the formation of a fund for the payment of the Government revenue upon it. It was there held that inasmuch as there was no disposition of the beneficial interest in the estates so to be purchased, the trust providing for accumulation was void.

The rule or rules against perpetuity, it should be observed, are subject to an exception in favour of religious gifts, and charities. Section 17 of the Transfer of Property Act lays down that "the restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind." One has to bear in mind that in England, gifts to religious houses were prohibited by various statutes. These were known as the Mortmain statutes, and in the time of Henry VIII,[2] from the spirit of intolerance which was then prevalent in England against the professors of a certain creed, all grants of lands on trust for parish charities or other institutions "erected and made for devotion, were, among other things, rendered void, if granted for any longer term than twenty-one years. A distinction, however, was afterwards made between charitable uses and superstitious uses, and gifts to charitable uses have been looked upon with great favour. In British India, no distinction is made between superstitious and charitable uses. In *Das Merces* v. *Cones*,[3] the testator directed by his will "that high masses in honour of the Blessed Virgin may be celebrated every Friday during the year, and that a Novena of St. Joseph with high masses

[1] 2 B. L R. O. C. J. 35.
[2] 23 Hen. VIII., c. 13.
[3] Hydes. Rep. 71, 73.

may be performed every year after my death; the former to cost Rs. 318 and the latter Rs. 200 per annum;" Norman, C. J. there observed: "By the law of England, gifts to superstitious uses appear to be void, as being contrary to the policy of the law for two reasons—first, because they tend to produce the same losses and inconveniences to the Crown and subjects of the realm, as in cases where lands are aliened in Mortmain, (see the preamble of the Statute 23 Hen. 8, c. 10); and secondly, because "the superstitions and errors in the Christian religion have been wrought into the minds and estimation of men, by reason of their ignorance of every true and perfect salvation, through the death of Jesus Christ, and by devising and phantasying vain hopes of purgatory, and masses satisfactorily to be done for those which be departed, which doctrine and vain opinion by nothing is maintained and upholden, than by the abuse of trentals (offices for the dead continuing thirty days or consisting of thirty masses), charities or other provisions made for the continuance of the said blindness and ignorance, (see the preamble of Stat. I, Edw. 6, c. 14.)" And it was there held that the portion of Common Law which declared gifts to superstitious uses void, did not apply to the gifts of persons born and domiciled in British India.[1] Indeed, it would be strange if it were otherwise in a country of multifarious creeds. Note the Hindu and the Mussulman custom of endowing musjids and idols.[2] It should be observed also that the Hindu, unlike the English law with respect to charities, makes no distinction between a religious endowment having for its object the worship of a household idol, and one which is for the benefit of the general public.[3] In the matter of charitable bequests and gifts, the object is manifestly, to use the expressive language of the Mussulman lawyers, to tie up the *corpus* and set free the profits or the uses. With regard to gifts to private individuals, the *corpus* cannot be tied up, as we have just seen, beyond a certain time. Gift to idols, no doubt, stands upon a footing of its own; but it should be noted that the law will not brook perpetuities under the cloak of religious endowments. In *Promotho Dassi* v. *Radhica Pershad Dutt*,[4] certain property consisting of a family dwelling house and land was devised to trustees forever, for the residence, maintenance, and performance of the worship of certain family idols, and appointed his sons and their descendants in the strict male line to be shebaits of the idols for ever, making provision for their residence in the family dwelling house; the will also contained a clause restraining any partition, division, or alienation of the property so dedicated to the worship of the idols.

[1] Note the observation of Lord Chelmsford, in *Whicker* v. *Hume*, 7 House of Lords' Cases, 151, "I conceive that the object of the Statute of Mortmain was wholly political, that it grew out of local circumstances, and was meant to have merely a local operation."

[2] See the observation of Lord Wynford in *Mullick* v. *Mullick*, 1 Knap., 247.

[3] Rupa Jugshet's case, I. L. R., 9 Bom., 169.

[4] 14 B. L. R., 175.

It was there HELD that "the devise to the idols was void and inoperative as being a settlement in perpetuity on the male descendants of the testator, and for their use, and not a real dedication for the worship of the idols." Then, again, charities must be for the public use. In *Townley* v. *Bedwill*,[1] where the testator created a trust for the purpose of establishing a perpetual botanical garden, but did not dedicate it to the public, and merely expressed that it would be a public benefit; such a dedication was held to be void. In *Rickard* v. *Robson*[2] it was remarked on the authorities of *Lloyd* v. *Lloyd*[3] and *Thompson* v. *Shakespeare*[4] that "a gift merely for the purpose of keeping up a tomb or building which is of no public benefit and only an individual advantage, is not a charitable use but a perpetuity." In *Moggridge* v. *Thackwell*,[5] Lord Eldon explains how charities became an object of favour:—"We all know, there was a period, when in this country a portion of the residue of every man's estate was applied to charity; and the Ordinary thought himself obliged to apply it; upon the ground that there was a general principle of piety in the testator. When the statute compelled a distribution, it is not impossible that the same favour should have been extended to charity in the construction of wills, by their own force purporting to authorize such a distribution. I have no doubt that cases much older than those I shall cite may be found; all of which appear to prove, that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated, shall not destroy the charity: but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." This is connected with the well-known *cy-près* doctrine of construction, or the doctrine of carrying out as nearly as possible the intention of the testator rather than that the intention should altogether fail. In the *Attorney-General* v. *The Ironmongers Company*,[6] there was a bequest of the residue of the testator's estate to a Company to apply the interest of a moiety "unto the redemption of British slaves in Turkey and Barbary," one-fourth to charity schools in London and its suburbs, and one-fourth towards the poor and destitute of the Company. The Court, having found that there were no British slaves in Turkey and Barbary, directed, upon the doctrine of *cy-près*, the gift of the moiety thus undisposed of to the use of the donees of the other fourth part.

Following the plan, as far as possible, of the Transfer of Property Act, we shall next consider the rules which deal with what are known in English law as vested and contingent remainders or interests. Section 19 runs thus: "Where

[1] 6 Ves., 194.
[2] 31 Beav., 244.
[3] 2 Sim., N. S., 255.
[4] 1 De. G., and J., 394.
[5] 7 Ves., 69.
[6] 2 Beav., 313.

on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith, or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer." The principle of vested interests consists in this that although the estate does not come into the possession of the donee until the happening of a specified event, yet the interest is considered to exist in him, so that in the event of his death before the time arrives of possession, at the prescribed time the heirs will take the estate which was originally given to their ancestor. The second paragraph of section 19 says that " a vested interest is not defeated by the death of the transferee before he obtains possession." The corresponding section in the Indian Succession Act (s. 106) is very clear, namely, " Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and *shall pass to the legatee's representatives if he dies before that time*, and without having received the legacy. And in such cases the legacy is from the testator's death said to be vested in interest."[1] If any estate, in the language of the English lawyers,[2] be it ever so small, is always ready from its commencement to its end to come into possession the moment the prior estates, be they what they may, happen to determine: it is then a vested remainder. It would be an estate in possession, were it not that other estates have a prior claim; and their priority alone postpones, or, perhaps, may entirely prevent possession being taken by the remainderman. The gift is immediate, but the enjoyment must necessarily depend on the determination of the estates of those who have a prior right to the possession. The terms of section 20 of the Transfer of Property Act further explain the meaning of vested interest. That section runs as follows: " Where on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless

[1] Note the Explanation to section 19 of the T. P. Act which is mnch the same as the Explanation to section 106 of the Indian Succession Act: " An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen, the interest shall pass to another person." Read the illustrations to s. 106 of the Succession Act which fully explain the context.

[2] Williams Real Prop. Stephen's Com. Note the distinction in the Roman Law between *dies cedit* and *dies venit, i. e.*, the distinction between the time when a right vests and the time when the performance of the obligation may be required. (Hunter's Roman Law, 747). An obvious illnstration of this is where property is given to a person, but possession is delayed until he arrives at maturity.

a contrary intention appear from the terms of his transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth." The object of the section is clearly to lay down the rule in a case where property, when it is given to a person, not *in esse* or hereafter to be born, without any words of qualification, shall be deemed to be vested, the necessary result being that property once vested will not revert to the representatives of the donor or the settlor although at the time of distribution the donee himself may not be living, his legal representatives being entitled to the property. Compare the principle of *dies venit* and *dies cedit* of the Roman law.[1] The interest vests; but the enjoyment is postponed.

The following sections, namely sections 21, 22, 23 and 24, deal with those cases, where the law will regard the gifts as contingent interests. Here, if the donee is not alive at the time when the contingency happens, his share would not at the time of distribution pass to his legal representatives, but revert to the donor or his representatives. These sections are in these terms:—s. 21 says, where on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case on the happening of the event, in the latter case when the happening of the event becomes impossible." An exception is pointed out to this rule, in these words: "Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent." Consider the two illustrations which I borrow with a slight modification from the Indian Succession Act.[2] A gives to B 500 Rupees a year upon his attaining the age of 18, and directs that the interest or a competent part thereof, shall be applied for his benefit until he reaches that age. A takes a vested interest in the annuity from the date of the transfer; and therefore should he happen to die before the time fixed for distribution, that is to say, the attainment by him of the age of 18, the annuity will then pass to his legal representatives, and not revert to the donor's estate. It has to be observed that in this case the donor provides that the interest of the very annuity which will be distributed to him at the age of 18 should go towards his benefit in the meantime. This is a different case from that where A gives to B an annuity of Rs. 500 when he shall attain the age of 18, and directs that a certain sum out of another fund, shall be applied for his maintenance until he arrives at that age. Here, the

[1] Hunter's Roman Law, 407.

[2] S. 107. Illustrations *l* and *m*.

transfer of the annuity creates a contingent interest, and should B die before he attains the age of 18, the annuity will not pass to his own legal representatives, but merge in the donor's estate.

Note, however, s. 22 :—" Where on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age." These words are the same, with some verbal alterations, as those in section 108 of the Indian Succession Act. The illustration to that section shows that in such a case even if the income of the share to which one of the members of the class might be entitled in the event of his arriving at the age of 18 shall be directed to be applied for his education and maintenance in the meantime, nevertheless that member cannot be said to have a vested interest in the share until he attains the age of 18.[1] Here, it should be remembered the gift is to a class, and the share of each member cannot be ascertained until the time of distribution arrives when alone it will be possible to find how many of the children are of the age of 18.

While we are on this subject it will not be out of place to quote the observations made in *Smith* v. *Packhurst*.[2] "The doctrine of contingent remainders is very nice and intricate, and if we were to cite all the cases in the books, I fear we should rather puzzle than explain the difficulty, the definition of a contingent remainder laid down by the counsel of the plaintiff that a remainder was contingent when it was uncertain whether it would take effect or not, is by no means, the legal notion of a contingent remainder. It is not the uncertainty of taking effect in possession that makes it contingent: if an estate is limited to A for life, remainder to B and the heirs of his body, every one will allow that this is a vested remainder, and yet it must be allowed that it is uncertain, whether B may not die without heirs of his body before the death of A, and consequently the remainder may never take effect in possession. We have considered this point a good deal, and are of opinion that all contingent remainders may be reduced to these two heads: (*a*) when a remainder is limited to a person not in being and who may possibly never exist, and (*b*) when a remainder depends upon a contingency collateral to the continuance of a particular estate. I will give an instance of each :—(*a*) if an estate is limited to A for life and remainder to his first son before he has any child, this is a contingent remainder of the first kind, for it is uncertain whether A will have any son; (*b*) if an estate is limited to A for life and after the death of

[1] Illustration to section 108 of the Indian Succession Act:—A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that while any child of A shall be under the age of 18, the income of the share to which it may be presumed he will be eventually entitled, shall be applied for his education and maintenance. No child of A who is under the age of 18 has a vested interest in the bequest.

[2] 3 Atkins Rep., 138.

J. S. to B in fee or after J. S. shall come from Rome, this is a contingent remainder of the second kind; for it is uncertain what time J. S. shall die or shall come from Rome: for as the law, for very good reasons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular estate determines, and it cannot immediately vest in those cases, when it is uncertain whether the contingency will happen." Such are the difficulties of this topic; but it should be noted that the Transfer of Property Act dispenses with the highly artificial distinction between contingent remainders and executory interests, and lays down categorically the cases in which interests which are to accrue in the future may be considered as vested interests, or as contingent interests, or when they may be regarded as having failed.

Section 23 of the Act provides that "where, on a transfer of property, an interest therein is to accrue to a specified person if a specific uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before or at the same time as, the intermediate or precedent interest ceases to exist." The section contemplates two circumstances: in the first place, the prior estate must come to an end at some time or other, and, in the second place the subsequent estate is dependent upon a contingency independent of the cessation of the prior estate. The interest may be a contingent remainder or a conditional limitation in the sense of the English lawyers. For instance, an estate is given to A for life and then to B contingent on the return of C from Rome. This would be deemed a conditional limitation; whereas if an estate is limited to A until B return from Rome, and after B's return, to C, the limitation to C is a good contingent remainder.[1] In either case should C have not returned from Rome on the death of A, the transfer in favour of B will fail altogether, otherwise the estate will remain in abeyance which the law will not tolerate.

The provision of s. 24[2] is fully explained by the illustration.

Next, we shall consider the question of the vesting and divesting of estates or gifts upon the fulfilment and non-fulfilment of conditions. The question deals with conditional gifts which are equivalent to conditional bequests under the Succession Act. A condition may be an event independent of the will of the donee or the legatee, or it may be an act or forbearance required of him. The terms, proviso and condition, are said to be synonymous, and signify some quality annexed to a real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event.[3] Conditions are either precedent or subsequent, where a

[1] Gilbert on Uses 3rd Edition. Sugden, 177 *n*.

[2] "Where on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appear from the terms of the transfer."

[3] Bac. Abr. tit. *Condition*. Woodfall, Law of Landlord and Tenant, 180 and 181.

condition must be performed before the estate can commence, it is called a condition precedent; but where the effect of the condition is either to enlarge or defeat an estate already created, it is then called a condition subsequent.[1] The distinction between the legal effects of these conditions may be thus explained: If the condition precedent is of such a nature that it is impossible of performance or that it should not be fulfilled, the gift does not take place at all, or the estate does not vest in the intended donee; but where a condition subsequent is of a character that it is impossible of performance or that it should not be fulfilled the ulterior gift does not take place at all, or the donee under the prior gift cannot be divested of his interest. It should be noted also that a condition subsequent is construed with great strictness. Section 25 runs thus: "An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy." Here the expression "fraudulent" refers to fraud that is intended to be committed on a third person. Suppose, the facts of *Degbie* v. *The Phosphate Sewage Company*[2] being slightly modified, A being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of X) for the utilization of sewage, agrees to transfer an estate to B on condition of his undertaking to raise a Company by inducing persons to take shares in the Company under the belief that if the Company bought the process of A, the Company would be entitled to the exclusive use of the process in X; in this case the transfer to B would be dependent on the fulfilment of a condition which is fraudulent. With regard to the point of "public policy," we may refer with advantage to *Egerton* v. *Earl Brownlow*. There the donor provided that if "Lord Alford shall not in his lifetime acquire the dignity of Duke or Marquis of *Bridgewater*,[3] the estates shall pass from the heirs male of his body immediately on his decease, and that if he, having succeeded to the earldom of Brownlow, shall not acquire the dignity within five years, the estates shall pass from himself as well as from his heirs." Here the tendency of the condition was regarded to be against public policy. Lord Brougham observed:—"In these times, no one will contend that the coarse form of naked bribery would probably be resorted to; but suppose the will had borne the date of 1678, instead of 1823, will any one pretend that the same improbability would have existed? Will any one affirm that the very persons from whom some illustrious members of this House descend would have withheld their influence over, I will not say the Sovereign, but the ministers of the day,

[1] Woodfall, Law of Landlord and Tenant, 181.
[2] L. R. 10 Q. B, 491.
[3] 4 House of Lord's Cases, 173 and 174.

towards raising the devisee to the rank to which their own progeny had attained, or would have spurned a gift of much less than sixty thousand pounds to propitiate that influence? If I go back half a century more than is necessary, it is because of a decided case at the earlier period; I might have stopped at 1723, and suggested that the possibility would even then have been anything rather than remote, of a skilful application of great resources obtaining a considerable advancement in the peerage, through certain favourites better known than respected. In those days—possibly of the first George, certainly of the Second Charles—this would have been considered as within the bounds of no remote possibility. But surely it can hardly be maintained that the condition which would, on this ground, have been held illegal then, has become lawful now, in consequence of a change in the degree of probability that it might lead to corruption. *The tendency alone is to be considered*, and unless the probability is so remote as to justify us in affirming that there is no tendency at all, the point is conceded. Gifts, bequests, conditions, contracts, are illegal from *their tendency to promote unlawful acts*, without regard to the amount of the inducement held out, or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done."

Any condition in general restraint of marriage is regarded as *contra bonos mores*, and therefore void; but it was held in *Perrim* v. *Lyon*[1] that "a condition in partial restraint of marriage is legal." There the testator devised his estate in fee to his daughter on condition that if his daughter should marry a Scotchman then she should forfeit all benefit under his will. Ellenborough, C. J. was of opinion that such a condition not being in general restraint of marriage, was valid. In *Burton* v. *Burton*,[2] a condition that a widow shall not marry was regarded not to be unlawful. In *Duggan* v. *Kelly*,[3] a condition not to marry a Papist was held to be valid.

It should be observed that a gift will be construed strictly against the donor, or in other words the law will presume in favour of a gift. Where a gift is made to a person with the direction that the gift will not come into operation until a certain condition has been performed, or a certain obligation has been discharged by the intended donee, it will be sufficient to vest the property in the donee if the condition has been substantially complied with.[4] For instance, a transfer is made to A on condition that he shall marry with the consent of B. C. D and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intention and has made no objection. A will be regarded as having fulfilled the condition, although the consent of the other persons has not been expressly given or the obligation has not been literally discharged. Similarly, when

[1] 9 Ves, 170

[2] 2 Vern, 308.

[3] 10 Ir Eq, 295.

[4] S. 26 of the Transfer of Property Act.

a gift is made to one person on condition that the gift will take effect only in the event of a prior gift of the same property not vesting in a prior donee. In such a case even if the failure of the former gift may not have occurred exactly in the manner contemplated by the donor the alternative gift will nevertheless take effect. For instance, A transfers his *taluq* to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect. The illustration, here, embodies the substance of *Avelyn* v. *Ward*.[1] "The ground on which the Court has proceeded in these cases," observes Lord Cranworth,[2] "is that the gift over, though made in the form of a condition was, on the true construction of the will, intended to take effect not only if the precise language of the condition was complied with, but also if some different event should happen which would have results the same as the condition." Upon the same principle, where there is a prior particular interest given, and then on the death of the donee under age there is a gift over, the gift over is held to take effect though the first taker never came into existence, and so could not fulfil literally the condition of dying under twenty-one.[3] To these cases there is an exception.[4] For instance, where the particular manner in which the prior estate should fail is indicated by the express language of the donor. In *Underwood* v. *Wing*,[5] a testator by his will bequeathed his property upon trust for his wife absolutely, and in case his said wife should die in his lifetime, he directed the property to go absolutely to Wing. The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water after which they were never seen again. It was there HELD that the gift to Wing was dependent on the testator surviving his wife, and that Wing did not become entitled from the mere fact of the gift to the wife failing to have practical operation. The Lord Chancellor thus expressed his view: "The gift to Mr. Wing is in terms made dependent, and was evidently meant to be dependent, on the single event of the testator surviving his wife: If she should survive, he gives everything to her, if she dies in his lifetime he gives everything to Mr. Wing; it is impossible to say that there is any third case or class of cases, to which the language of the bill could possibly be applicable. *It may be that, if the extremely improbable* event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property; but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object."

[1] 1 Ves., 420 per Lord Hardwicke.

[2] *Underwood* v *Wing*, 4 De Gex M and G, 663.

[3] *Ibid*, 662.

[4] Transfer of Property Act, s 27.

[5] 4 D. Gex. M. and G., 633.

Connected with these provisions is the rule laid down in section 28, namely, "on a transfer of property an interest therein may be created to accrue to any person with the condition superadded, that in case a specified uncertain event shall happen, such interest shall pass to another person, or that in case a specified uncertain event shall not happen, such interest shall pass to another person." This rule is of course to be observed so long as the superadded condition does not transgress any of the previous rules.[1] The following section renders the meaning perfectly clear: it says, "An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled." The principle here is that, in a competition between two donees, one prior and the other subsequent, the later gift being dependent on a condition on the accrual or non-accrual of which the prior donee will have to be divested of the interest before the latter can take, the law looks with disfavour upon forfeiture, and, therefore, unless the condition is strictly fulfilled, the law will not divest the prior donee and invest the latter. As section 26 deals with conditions precedent, this section deals with conditions subsequent, which go to divest estates already vested.[2] It should be observed that the subsequent gifts in this case are dependent on the failure of prior gifts which within the meaning of the Act are vested interests. The disfavour with which the law looks upon the divesting of property is further exemplified by the provision of section 30 which is to this effect: "If the ulterior disposition is not valid, the prior disposition is not effected by it." That is to say, though an estate would never vest at all, or a gift would never take effect if coupled with the performance of a condition which is illegal or *contra bonos mores*, yet when a gift has once been vested, the law will not allow it to be divested, notwithstanding the direction of the donor that it should be divested if a condition, which is illegal or *contra bonos mores* is not fulfilled. In such a case the donee continues to hold the property as if the condition had not existed at all, and in the event of there being a provision for a gift over upon the non-fulfilment of the condition, the gift over does not take effect at all. In *Carey* v. *Bertie*[3] Holt, C. J. thus observed: "In case of conditions subsequent that are to defeat an estate, those are not favoured in law, and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited, and a Court of Equity may relieve to prevent the divesting of an estate, that cannot relieve to give an estate that never vested." Note the provision of section 32, "In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest." But although as a rule the law looks with disfavour on the divesting

[1] I. E., ss. 10, 12, 21, 22, 23, 24, 25, and 27.

[2] EXAMINE, *Chauncy* v. *Graydon*, 2 Atk., 616.

[3] 2 Vern. 339.

of an estate, yet there may be cases in which the law will permit the divesting of an interest upon the non-fulfilment of conditions which are neither illegal nor *contra bonos mores*, and forfeiture may take place even if there be no gift over. Section 31 provides that "subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen." Note this illustration to the section[1]:—A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

Section 33 says, "Where on a transfer of property an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act." Here is an instance: A gift is made to M with a proviso that unless he enters the army, the estate shall go over to N. M takes holy orders and thereby renders it impossible that he shall fulfil the condition. N is entitled to receive the estate. Or, where a gift is made to M with a proviso that it shall cease to have any effect, if he does not marry N's daughter. M marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The gift ceases to have effect.[2]

Section 34 runs as follows: "Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him; or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by the non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled." It was said in an old case that "where the condition is not performed on account of the fraud of the donee over, equity will relieve." It was held in *Popham* v. *Bamfield*,[3] that "where a remainderman, who is to take the estate on performance of the condition, has used any indirect practice or contrivance to prevent the performance, equity will relieve." In *Mesgrett* v. *Mesgrett*,[4]

[1] See *Lester* v. *Garland*, 15 Ves. 248

[2] See illustrations to s. 123 of the Succession Act.

[3] 1 Vern. 80.

[4] 2 Vern. 580.

the testatrix made a devise of her personalty to her only child; but if she married before the age of twenty-one, without the consent of the executors or the major part of them, in such case what she had devised to the daughter should go to the children of her sister, the wife of the defendant, David Mesgrett; and made the defendant and some others executors. The plaintiff being eleven years old at the death of her mother, lived for some time afterwards with one of the executors, and was there courted by the co-plaintiff, her now husband, the son of David Mesgrett, by a former wife, and afterwards the plaintiff removed to the house of the said David Mesgrett, where the marriage was had, the plaintiff being under twenty-one. The defendant urged that the legacy was forfeited and devised to his children by his second wife. The other executors answered that they had notice such match was carrying on, did not contradict or disapprove of it, nor remove the young man as they might have done. Here, the Court decreed for the plaintiffs, having looked upon the matter as a fraud in David Mesgrett in promoting the marriage, and afterwards to pretend a forfeiture for want of a consent to gain the legacy to his children by his last wife.

I shall in the next place proceed to consider the subject of Election. The doctrine of Election has been thus explained: that he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If therefore a testator or donor has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the donee or devisee accepting the benefit so given to him must make good the donor's attempted disposition; but if, on the contrary, he chooses to enforce his proprietary rights against the donor's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.[1] Section 35 of the Transfer of Property Act, first of all, lays down that "where a person professes to transfer property which he has no right to transfer and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of." Now, in the first place, it should be observed that, as distinguished from the Roman law,[2] under the English law, whether the donor really believed the property he was professing to deal with to be not his own, or erroneously believed it to be his own, or did not know it to be his own, the donee is equally put to his election. Note the observation of the Master of the Rolls

[1] Jarman on Wills, Vol. I, 415.

[2] Hunter's Roman Law, 715.

in *Whistler* v. *Webster*,[1] "no man shall claim any benefit under a will without conforming as far as he is able, and giving effect, to everything contained in it, whereby any disposition is made shewing an intention, that such a thing shall take place; without reference to the circumstance, whether the testator had any knowledge of the extent of his power or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention; and I will not speculate upon what he would have intended in different cases put." In the words of the section, "the rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own." It is also important to note that, under the Indian Act, if the owner of the property which is transferred to another does not confirm the transfer, he must forfeit every part of the benefit which the donor may have given to him by way of substitution. Under the English law, the owner of the property, whether the transfer is by deed or will,[2] electing to take against the instrument does not necessarily forfeit every part of the benefit which might have been left to him in lieu of his own property. He is merely compelled to make compensation to the donee who is disappointed by reason of the owner of the property refusing to confirm the act of the donor. For instance, A gives a sum of 30,000 Rs. to B, and by the same instrument bestows on C an estate of B's, worth 20,000 Rs. B may refuse to give up his estate against the intention of the donor and yet claim the difference of 10,000 Rs. out of the 30,000 Rs. left to his use. Note the observation of Chief Justice De Grey: "an express condition must be performed as framed, and if it is not, that will induce a forfeiture; but the equity of this Court is to sequester the devised interest *quousque*, till satisfaction is made to the disappointed devisee."[3] In *Schroder* v. *Schroder*,[4] it was said that the "question which has been much discussed is whether the principle governing cases of election under a will is forfeiture or compensation; the strong current of the authorities specially those of a recent date is in favour of the principle of compensation." It will be necessary to explain a little further the illustration I have already given in relation to the circumstance in which a person refuses to give up his own estate worth 20,000 Rs. in compliance with the terms of a deed in which the donor has professed to give that estate to another person, and at the same time has bestowed 30,000 Rs. on the owner of the estate. In such a case we have just seen

[1] 2 Ves., 370.

[2] In *Bigland* v. *Huddlestone*, 3 Bro. C. C., 285 *n*, Lord Thurlow said it was against conscience for a devisee to disappoint the will, and held that the doctrine of election applied equally to a deed.

[3] Approved by Lord Loughborough in *Lady Cavan* v. *Pulteney*, 2 Ves., 559, 560.

[4] Kay, 578.

that under the English law the owner of the estate may refuse to give up his own estate, and yet claim 10,000 Rs. out of the 30,000 Rs.; and the sum of 20,000 Rs. out of the 30,000 Rs. will thereupon go to the disappointed donee. Under the Transfer of Property Act, the owner of the estate refusing to act in compliance with the terms of the deed loses every benefit under the deed. By refusing to give up his estate he ferfeits his claim even to the 10,000 Rs.; but neither does the disappointed donee get anything at all, *unless*, in the words of the section, "where the transfer is gratuitous, and the transferor has before the election died or otherwise become incapable of making a fresh transfer." It is only then that the transferor or his representative becomes subject "to a charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him." The disappointed transferee, however, is entitled to such a compensation, "*in all cases* where the transfer is for a consideration."

It should, however, be observed that "a person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect." Take the following illustration[1]:—The lands of Sultanpore are settled upon C for life, and after his death upon D his only child. A, under a deed, gives the lands of Sultanpore to B, and 1,000 rupees to C. C dies intestate shortly after the donor, and without having made any election. D takes out administration to C, and as administrator elects on behalf of C's estate to take under A's deed. In that capacity he receives the gift of 1,000 Rs. and accounts to B for the rents of the lands of Sultanpore which accrued before the death of C. In his individual character he retains the lands of Sultanpore in opposition to A's deed.

Again, in the words of the section, "a person who in his own capacity takes a benefit under the transaction may in another dissent thereform." The illustration to section 172 of the Succession Act may be also here applied; *e. g.*, The estate of Sultanpore is settled upon A for life, and after his death upon B. A by an interest leaves the estate of Sultanpore to D, and 2,000 Rs. to B, and 1,000 Rs. to C who is B's only child. B dies intestate without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpore in opposition to the instrument, and to relinquish the gift of 2,000 Rs. C may do this and yet claim the gift of 1,000 Rs. made to him under the instrument.

Besides, "where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish

[1] The Succession Act, section 171, illustration slightly modified.

any other benefit conferred upon him by the same transaction," *e. g.*, under A's marriage settlement his wife is entitled to the enjoyment of the estate of Sultanpore during her life. A under a deed provides for the annuity to his wife of 2,000 Rs. during her life, in lieu of her interest in the estate of Sultanpore, which estate he gives to his son. He also gives his wife a sum of 10,000 Rs. The wife refuses to give up her life-estate in Sultanpore. She is bound to relinquish the annuity; but not the gift of 10,000 Rs.[1]

A word may be said as to how a person will be presumed to have elected. In *Whitley* v. *Whitley*,[2] a testator by his will gave to his widow his personal estate absolutely, and certain interests in his real estate, and "as to all my said estate and interest in the R. property, I give, devise and bequeath the same to my wife for her own use and benefit for the term of her natural life, and from, and immediately after her decease, I give, devise and bequeath the same unto my daughter for her own use and benefit absolutely for ever." On the death of the testator, his will was proved by his widow alone who accepted the benefits given to her by her husband's will. The R property was one which belonged to her as her separate estate. On the death of the widow, the daughter claimed the R estate under the provisions of the will. Romilly, M. R. there said: "John Davies (the testator) intended to dispose of his property by will. It was not his, but it belonged to his wife; and she having taken and enjoyed the benefits provided for her under his will and acted under it, must be considered as having elected. This property must therefore go as if it had been John Davies' property." In the words of the section, "acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances." Enjoyment for two years without doing any act to express dissent will constitute presumption of knowledge or waiver. Such knowledge or waiver may be inferred from any act of the person, on whom the benefit has been conferred, which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.[3] Moreover, an election to confirm the transfer shall be deemed to have been made, if the person on whom the benefit is conferred, fails to comply within a reasonable time with the request made to him by the transferor or his representative, he not having within one year after the date of the transfer signified to the

[1] See illustration to section 172, Exception, modified, of the Succession Act.

31 Beav., 173.

[2] A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coalmine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

transferor or his representative, his intention to confirm or dissent from the transfer. It should be noted that in case of infancy or other disability on the part of the person on whom the benefit is conferred, the election shall be postponed until the disability has ceased, or until the election is made by some competent authority.

We have had occasion to observe before that any condition in a gift which absolutely restrains the right of alienation is void. Partial restraint on alienation is, however, permitted by law. In *Gill* against *Pearson*,[1] the testator devised certain lands in Y to A and H and their heirs as tenants in common, *on condition*, that in case they or either of them should have no issue, they or she having no issue should have no power to dispose of the share except to the sisters or their children." Lord Ellenborough, C. J. held it to be a good condition.

The subject of partial restraint on alienation leads us to a consideration of the law of pre-emption which is well-known in this country. The law of pre-emption as it now obtains in British India, whatever may have been its early origin, is of Mussulman importation. The origin of the law or custom of pre-emption may, however, be traced to a certain stage in the development of society. It is clearly the result of a compromise between the old notion of a family with its characteristic horror of alienation, and the desire of alienation which springs from the necessities of a more or less commercial age. Take the following passage from the Mitakshara:[2] "Land passes by six formalities; by consent of townsmen, of kinsmen, of neighbours and heirs, and by gift of gold and of water." The ancient law of France recognized three forms of pre-emption (retrait):—(*a*) the right of pre-emption which arises from common descent, (*b*) the right of pre-emption which arises from co-partnership, and (*c*) the right of pre-emption which arises from vicinage.[3] All these forms of pre-emption are still found to exist in South America and in Sweden.[4] The Mussulman law recognizes three kinds of pre-emption (shafa). The right of shafa, in the language of the Hedaya,[5] appertains (*a*) to a partner in the property of the land sold, (*b*) to a partner in the immunities and appendages of the land (such as the right to water, and to roads), and (*c*) a neighbour. The right of pre-emption consists in this that the pre-emptor has a claim to be substituted on payment of the price in the place of the buyer.[6] In order to establish one's claim of pre-

[1] 6 East., 173.

[2] Inheritance, c. 1, s. 30.

[3] *Ce sont le retrait lignager; le retrait partiaire, exercé par les co-propriétaires d'un immeuble indivis, et retrait exercé par les voisins.*" Les Codes Civils E'trangers, Introduction, LXXVIII.

[4] *Ibid.*

[5] Hamilton's Hidaya, 548.

[6] See Codes Civils E'trangers, Introduction:—Le droit de se substituer à un acheteur.

emption under the Mussulman law, one has to observe certain formalities. The pre-emptor must prefer his claim the moment he is apprised of the conclusion of the sale (talab-i-mawasabat) and it is also requisite that he should claim by affirmation and taking to witness (talab-i-ishhad); inasmuch as, in the words of the Hedaya, "the right of shafa is of a feeble nature."[1] This rule of pre-emption is personal to the Mussulman people in British India, and obtains only among those Hindus, as the Brahmanic people are now called, who have adopted that Mussulman custom.[2]

The law of pre-emption at present known in England is to be met with in the Lands Clauses Consolidation Act,[3] whereby the promoters of the undertaking authorized by the special Act are required to sell superfluous lands in the first instance, unless they be lands situate in a town or built upon or used for building purposes, to the person then entitled to the lands, or, in the absence of such person, to the immediately adjoining owner.

Apart from the law or custom of pre-emption, it seems that owing to the desire which men are known to feel, for the preservation as far as possible of their estate in the hands of their relations or even co-sharers, the condition of pre-emption has sometimes been made a matter of contract or of will. In *Brooke* v. *Garrod*,[4] a testator directed his trustees to offer his real estate, including a moiety of an estate of which he was tenant in common with his brother, to the brother at a specified sum; but in case the brother should not within a certain time after the testator's death signify his intention to accept the property at the price, then the testator directed the property to be sold by auction.[5] In *Austin* v. *Tawney*,[6] a testator gave to his children in succession an option to purchase certain property at a price to be fixed by arbitration within a prescribed time, and declared the time to be allowed to each of his children for exercising the option. It should be observed that in English law conditions imposed on the exercise of the option of pre-emption are always strictly construed, and all precedent conditions must be fulfilled by the purchaser before any contract binding the vendor can arise.[7]

The most prominent instance of contractual or conventional pre-emption is to be met with in the administration papers or wajibularz of the North-Western Provinces.[8] The owner or co-sharer of an estate is not infrequently in the

[1] *Zahur* v. *Nurali*, I. L. R, 2 All. 100.

[2] Saligram *v.* Raghuburdyal, 15 Cal., 224.

[3] The Act of 1845, Ss. 127—128.

[4] 2 De. G. and J, 62

[5] See, also, *Radnor* v. *Shafto*, 11 Ves, 448.

[6] L. R., 2 Ch. Ap., 143.

[7] Weston *v.* Collins, 11 Jur. N. S. 190.

[8] *Al-Arz* = the administration paper prepared at the Settlements in which the rights of

habit of having it recorded that should any of his descendants be disposed to sell or mortgage the property or share, the first offer should be made to one of the *bhai band*[1] (brotherhood) or of the *ekjaddi* (same ancestor) or a co-sharer.[2] Under the law of Austria,[3] a co-proprietor or owner may record the condition of pre-emption in the public Register.

the community are formally recorded and verified by those concerned. In the paper, a brief history of the village and all local and family customs are usually recorded. *Wajib-ul-Arz* the necessary things in an administration paper.

[1] See *Hiralal* v. *Ramjus*, I. L. R., 6 All. 57.

[2] Consult on the subject of *pre-emption*:—*Farman Khan* v. *Bharat Chandra Shah*, 4 B. L. R. (F. B.) 134, *Govind Dyal* v. *Ynayatullah*, I. L R, 7 All. 782; Dila Kumari's case, I. L. R., 6 All., 17; Tawakkal Rae's case, I. L. R., 6 All., 344; *Rasiklal* v. *Gajraj Singh*, I. L. R, 4 All., 414.

[3] Les Codes Civils E'trangers, Introduction.

LECTURE X

ON FRAUDULENT TRANSFERS OR ALIENATIONS.

Fraudulent alienations forbidden—Ethics of the law of transfer—The Common law on Fraud—Manu on Fraud—Lord Eldon's condemnation of Fraud—Labeo's definition of Fraud—Misrepresentation, the badge of fraud—Lord Brougham's idea of misrepresentation—Conveyances in fraud of creditors and others—Ulpian on fraudulent conveyances—Cicero's view—*Nihil est enim liberale quod non idem justum*—Roman law, the basis of English law—The statutes of Elizabeth against fraud—13 Elizabeth, c. 5—27 Elizabeth, c. 4—Good consideration, meritorious consideration, valuable consideration—Marriage is a valuable consideration—Inadequacy of price—Valuable consideration and *bonâ fide* will avail against creditors and others—Cases illustrative—Twyne's case—*Cadogan* v. *Kennett*—*Kevan* v. *Crawford*—Conveyance in the name of Child—Presumption of advancement—*Christy* v. *Courteney*—Subsequent creditors, how far protected—*Spirett* v. *Willows*—Vice-Chancellor James's criticism—Mr. May's observation—Distinction between the two statutes of Elizabeth—Cases illustrative—The British Indian law—Benami transaction—Sir Erskine Perry's observation—*Roshun Bibi* v. *Kureembux*—*Ughurali* v. *Ultaf Fatima*—Azimatali's case—Abdul Hye's case—No presumption of advancement among "Hindus and Mahommedans"—Marriage is valuable consideration, but *bonâ fides* essential to support settlement.—Mrs. Pogose's case—The Transfer of Property Act, s. 53—The term "in good faith"—Lord Cairns's Explanation—The Definition of Notice—The Transfer of Property Act, s. 3—Fraud between persons in fiduciary relation or the like—*Bridgeman* v. *Green*—Sir Samuel Romilly's famous argument in *Huguenin* v. *Baseley*—*Hunter* v. *Atkins*—*Rhodes* v. *Bate*—*Dent* v. *Bennet*—*Pushong* v. *Munia*—Fear of secret collision in India—Tarakanto Banerjee's case—Purdanashin females and imbecile heirs—*Nedham* v. *Beaumont*, its applicability to India—The doctrine by *Lis pendens*—*Preston* v. *Tubbin*—*Barry* v. *Gibbons*—*Bellamy* v. *Sabine*—The British India law—Kassim Shaw's case—Umamoyi Burmonia's case—Balaji Gonesh's case—The Transfer of Property Act, s. 52—Actionable claims—The principle of Champerty and Maintenance underlies the provisions—The statutes of Edward I and Edward III—Roman law on actionable claims—Anastasius's rule—The Transfer of Property Act, s. 130—Code Napoléon—*Le droit litigieux*—Chose in action—Muddon Mohan Dutt's case—Difficulty as to what class of cases falls within actionable claims—Rudrapurkash Misser's case.

Having defined the limits within which an owner is permitted by law to impose such conditions as he pleases with respect to the time, duration or mode of enjoyment of the subject matter of the gift or transfer by the donee or transferee, it will be convenient, in the next place, to examine the circumstances under which the law will restrain the owner from exercising his otherwise undoubted right of alienation when the exercise of such right is found to defraud or defeat the rights of others; and, sometimes, even protect the transferor against his own alienatiou. Such a field of inquiry may not inappropriately be described as the ethics of the law of transfer.

Nothing is more abhorrent to law than fraud,[1] and any transaction which savours of fraud or bears the semblance of fraud will at the instance of the defrauded or injured party be treated as null and void, or deemed as if it had never taken place at all. "Where the judge," declares Manu, "discovers a fraudulent pledge or sale, a fraudulent gift or acceptance or in whatever other case, he detects fraud, let him annul the whole transaction."[2] LORD ELDON condemns a gift which is the offspring of fraud in these terms:—"Whoever receives it must take it tainted and infected with the imposition of the person taking the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift. Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."[3] Fraud is so multifarious in its character that lawyers have refrained from the attempt to lay down any concise definition of it.[4] The definition of fraud which one meets with in the Digest is attributed to Labeo and approved by Ulpian. This is the definition:—"*Dolum malum esse omnem caliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibitam.*"[5] It should be understood that, for all practical purposes, misrepresentation is the badge of fraud. Misrepresentation may arise in various ways. There may be the suggestion of falsehood, or the concealment of truth. But, before the law will give any relief on the ground of misrepresentation, it must appear that the misrepresentation was connected with the particular transaction, "and not only connected with the particular transaction, but must be made to be the very ground upon which the transaction took place, and must have given rise to the contract."[6]

First of all, I shall proceed to deal with those peculiar cases of fraud that assume the form of alienation, the direct object or tendency of which is to deprive the rights or frustrate the expectations of creditors. When the object is direct it is said to be a case of actual fraud; but where the tendency is to produce evil that is said to be a case of constructive fraud. Men are in the habit of allowing credit or giving loans to others on the faith of the circumstances in which they find their constituents or their debtors. And the law in order to preserve confidence among men will regard with jealous care any improper attempt to alter those circumstances in derogation of the rights of creditors. In the

[1] "The Common Law of England abhors fraud," Pauncelot's case, Coke's Rep., Part III, 82. Again, "the law abhors covin, and therefore every covinous act shall be void." 3 Com. Dig., 295.

[2] Manu c. 8, v. 65. योगाधमनविक्रौतं योगदानप्रतिग्रहं। यच्चान्यदपि पश्येत्तत्सर्वं विनिवर्तयेत्॥

[3] *Huguenin* v. *Baseley*, 14 Ves., 273. Lord Eldon adopts the words of Wilmot, C. J.

[4] Anson on Contract, 152.

[5] D. 4, 3, 1, 2.

[6] *Per Lord Brougham*, *Attwood* v. *Small*, 6 Cl and Fin., 447.

words of Ulpian, a creditor is defrauded when the debtor has diminished any portion of his substance.[1] So careful was the Roman law of the interests of creditors that it even proscribed any act of generosity on the part of the debtor, lest such an act should interfere with the lawful demands of the creditor. Indeed, herein, the jurist yielded to the sentiment of the moralist that "nothing is generous which is not at the same time just."[2] Here is an instance from the Digest: "Lucius Titius, being indebted to several persons, made a gift of all his estate to his freedmen, who were also his natural children; now, although he might not have had the positive intention of thereby depriving his creditors, yet as he was aware of his indebtedness at the time, and was conveying away all his estate, he must be presumed to have made the gift with the intention of defrauding his creditors, and whether the children were acquainted with the father's intention or not, the creditors, will have their remedy."[3] In other words, any voluntary alienation on the part of the debtor under circumstances which would imply fraud, whether the donee was aware of the fact or not was liable to be set aside at the instance of the creditors; but in the case of alienation for valuable consideration, the transferee was protected unless he was aware of the fraud. The principle upon which the distinction was made was that where a mere gift was set aside, the gratuitous donee, in the words of Ulpian, did not sustain actual loss, the worst that he suffered was that the gift was taken away, but he was left precisely in the same condition as before, whereas it would be otherwise with a transferee for value.[4] In Roman law, marriage was regarded in the light of a valuable consideration, and an instance occurs in the Digest of a father-in-law giving a *dos* to his son-in-law; it is said there that although the former might have been indebted at the time, yet if the son-in-law was innocent of the fact of fraud, the *dos* would stand good,[5] the reason being that the man would not have taken an unendowed wife.[6] It will appear later on that the Roman law on the subject is also the law of England and its dependencies.

In the year 1571, was passed the statute of 13 Elizabeth, c. 5. The object

[1] This is the dictum with slight verbal alteration: "Fraudantur creditors cum quid de bonis deminuitur a debitore." D. 50, 17, 134.

[2] Cic De Off i, 14. "Nihil est enim liberale quod non idem justum."

[3] D. 42, 8, 17, 1, "Lucius Titius cum haberet creditores libertis suis isdemque filiis naturalibus universas res suas tradidit. Respondit: quamvis non proponatur consilium fraudandi habuisse, tamen qui creditores habere se scit et universa bona sua alienavit, intelligendus set fraudandorum creditorum consilium habuisse, ideoque et si filii ejus ignoraverunt hanc mentem patris sui fuisse, hac actione tenentur."

[4] D. 42, 8, 6, 11: "Nec videtur injuria adfici is qui ignoravit, cum lucrum extorqueatur, non damnum infligatur." Cf D. 42, 8, 1, 7.

[5] D. 42, 8, 25, 1.

[6] Ibid "Cum is indotatam uxorem ducturus non fuerit."

of it was, in the quaint language of the time, "for avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, conveyances and the like, more commonly used and practised in these days than hath been seen or heard of heretofore, to the end, purpose and intent to delay, hinder or defraud creditors and others." The statute concludes with the proviso "that this Act or anything therein contained shall not extend to any estate or interest had, made, conveyed or assured which interest or estate is or shall be upon *good consideration* and *bonâ fide* lawfully conveyed to any person not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid."

Similarly, there was enacted, in the year 1584, the statute of 27 Elizabeth, c. 4. The object of that statute was to avoid mischief by fraudulent conveyances of lands, "which said gifts, grants, charges, estates, uses and conveyances," in the words of the Act, "were or hereafter shall be meant or intended by the parties that so make the same to be fraudulent and covinous, with the purpose and intent to deceive such as *have purchased* or *shall purchase* the same, or else, by the secret intent of the parties, the same be to their own proper use and at their free disposition coloured, nevertheless, by a feigned countenance, and show of words and sentences, as the same were made *bonâ fide* for good causes and upon just and lawful consideration." To this there was added the same kind of provision for the protection of *bonâ fide* purchasers for value as in the prior Act.

It will be seen that the principles involved are much the same in both the Acts. At all events, for our present purpose, it will be needless to treat of them separately.

Now, in the construction of the statutes, although there is noticeable, here and there, some difference of opinion, the reported cases may fairly be taken to have established these propositions: (*a*) that "good consideration" should be interpreted as valuable consideration, and not mere consideration of blood or natural affection, or, as it is sometimes called, meritorious consideration; (*b*) that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud; (*c*) that marriage should be regarded as a valuable consideration; (*d*) that although mere inadequacy of price where the transaction is *bonâ fide* will not vitiate a transaction, gross inadequacy of price shall; and (*e*) that valuable consideration will not alone be sufficient to sustain a conveyance or transfer against creditors and others unless the transaction was also *bonâ fide*.

In Twyne's case,[1] it was said that "there are two manners of gifts on good consideration, *scil*, consideration of nature or blood, and a valuable consideration. As to the first, if he who is indebted to several persons, in consideration of

[1] 2 Coke's Rep.

natural affection gives all his goods to his son or cousin, in that case, inasmuch as others should lose their debts, which are things of value, the intent of the Act was, that the consideration in such case should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and, therefore, it shall be intended, that it was made to defeat his creditors; and if consideration of nature or blood should be a good consideration within the proviso, the statute would serve for little or nothing; and no creditor would be sure of his debt. When a man being greatly indebted to sundry persons, makes a gift to his son or any of his blood without consideration, but only of nature, the law intends a trust betwixt them, *scil*, that the donee would, in consideration of such gift being voluntary and freely made to him, and also in consideration of nature, relieve his father, or cousin and not see him want who had made such gift to him. To one who marvelled what should be the reason that Acts and statutes are continually made at every Parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse:—"Quæritur, ut crescunt tot magna volumina legis? In promptu causa est, crescit in orbe dolus."[1] It was resolved in this case by the whole Court "that, because fraud and deceit abound in these days more than in former times, all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud."

On the point that voluntary gifts, whether upon the consideration of blood or other merely moral consideration, should be postponed to the claims of creditors, it was thus observed by a learned judge in *Taylor* v. *Jones*.[2] "It is upon these reasons I must decree for the plaintiffs, the creditors, against the wife and children; for although I have a great compassion for wife and children, yet, on the other side, it is possible, if creditors should not have their debts, their wives and children may be reduced to want." In *ex-parte* Williams,[3] Bacon, C. J. said:—"Benevolence, generosity, forbearance may be well exercised —with this restriction, however, that the practice of these moral virtues is not made at the expense of other people. To hold the contrary would be directly opposed to the commonest principles of justice and honesty."

Mathews v. *Feaver*[4] furnishes an instance of a grossly inadequate consideration. There, the plaintiffs were the assignees of a bond which was entered into by Robert Feaver, the defendant's father, for securing a sum of

[1] "They wonder why there should be so many volumes of law, heaped one upon the other, the answer is because fraud and deceit are becoming so abundant in the world."

[2] 2 Atk. 602 (1743.) [3] L. R 10 Equ 59 (1870.) [4] 1 Cox. 278 (1786.)

300£ being the marriage portion given by the said Robert Feaver on the marriage of his daughter with James Mathews, and the said James Mathews having assigned the same as security for two sums of 200£ and 100£ in which he was indebted to the two plaintiffs respectively, and the said Robert Feaver, the father, being dead, and leaving the defendant, Robert Feaver, the son, his personal representative, the present bill was brought against Robert Feaver, the son, for the discovery of the father's assets, and for payment of the said bond. The defendant, Robert Feaver, the son, by his answer to the original bill denied that he possessed assets of his father to any greater amount than 40£, but insisted on the benefit of an assignment made by the father to him some short time before the father's death, whereby in consideration of an annuity of 30£ to be paid by the son to the father during the father's life, and of natural love and affection, the father assigned over to the son certain leasehold premises and his stock in trade, and several other articles therein enumerated. The facts were that *at the time of the assignment*, the defendant Robert Feaver, the son, had notice of the plaintiff's claim in respect of the said bond, that the father was about 77 years of age, in an infirm state and not likely to live, that the property assigned was in fact the whole of the father's property about 600£. Thereupon Kenyon, M. R. remarked: "If the conveyance had been made without any consideration, it would certainly have been void under the statute, and I am of the same opinion where the consideration is entirely inadequate. It is true as between vendor and vendee the Court will not weigh the consideration in golden scales; but this is a transaction between the father and the son, and natural love and affection is mentioned as part of the transaction, upon which as against creditors, I cannot rest at all. It is true, it is a consideration, which though not valuable, is yet called meritorious, and which, in many instances, the Court will maintain, but not against creditors." In *Freeman* v. *Pope*,[1] where a person who was indebted at the time made a settlement of a policy of assurance on his god-daughter which he had made several years before in his favour; LORD HATHERLEY observed—"The principle on which the statute of Elizabeth, c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made. It is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then since it is the necessary consequence of the settlement that some creditors must remain upaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay the creditors, and that the case is within the

[1] L. R. 5 Ch. Ap. 538.

statute. If we had to decide the question of actual intention, probably we might conclude that the settlor when he made the settlement was not thinking of his creditors at all, but was only thinking of the lady whom he wished to benefit, and that his whole mind being given up to consideration of generosity and kindness towards her, he forgot that his creditors had higher claims upon him; and he provided for her without providing for them. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled; but he did an act which in point of fact withdrew that fund from them; and dealt with it by way of bounty."

In *Townshend* v. *Windham*,[1] LORD HARDWICKE said that "the duties of this court are established, as far as they can be, in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors, and the court has extended the doctrine of late: and though an unfortunate case may arise in the case of children, for whom parents are bound by nature to provide, it is impossible to say the consideration in respect of them is of so high a nature as that of paying just debts, and therefore the court never preferred them to just creditors who might otherwise be defeated of a satisfaction of their debts."

Marriage is looked upon in the light of a valuable consideration; but as in other cases of valuable consideration, good faith is essential to the validity of a transaction which is supported by marriage. In *Campton* v. *Cotton*,[2] a person who was indebted had in consideration of marriage made a gift of a freehold estate to his wife; he also gave her after marriage a quantity of jewels. It was held in a suit by the creditor of the husband to set aside the transaction that marriage was a sufficient consideration for the gift of the freehold estate. Grant, M. R. then observed, "I do not think it can be inferred from the evidence that he knew that he was in such circumstances as to make his bounty to her a fraud upon any one; while it was mere bounty, she could not, indeed, have compelled him to complete her title by conveyance; but from the moment the consideration of marriage intervened, it became matter of obligation upon him to give her all the title he himself had; and there is no proof of any such fraud in her as can prevent her receiving the benefit of that obligation. There is no ground, therefore, upon which the creditors can avoid the settlement in whole or in part. As to the additional value that the land may have received by building subsequent to the marriage, I do not see how it is possible to make a mere voluntary expenditure by him upon her estate a ground of charge against her or her estate; "the jewels purchased by him and given to her after the marriage, are subject to the debts unquestionably." Note, here, the distinction between ante-nuptial and post-nuptial settlements, the latter, unless made in pur-

[1] 2 Ves. sen. 10 (1750)

[2] 17 Ves 272-273 (1810)

suance of a contract before marriage, are regarded as mere gifts. In *Kevan* v. *Crawford*,[1] C, who was carrying on business as a flax spinner, was at the time of his engagement to a Belgian lady, P, utterly and hopelessly insolvent. He arranged a marriage with her on the terms, as he said, that he should settle £20,000 on her, she having no property, and he so informed her. He then went to a respectable solicitor, and told him that he was indebted (which was wholly untrue) to P in the sum of £20,000, and in consideration of the debt and marriage then about to be solemnized, he covenanted to pay within a short period of time this sum of £20,000 to the trustees named in the settlement to be settled on his wife for life, with remainder to himself for life, with remainder to the children of the marriage with remainder over. It was held there that inasmuch as the settlement was for value given by the wife, namely, the consideration of marriage, and she was no party to the fraud, it was unimpeachable on the part of the creditor. Jessel, M. R. observed: "And although the settlement contained a false statement that she was a creditor of C; for £20,000, she executed it without being actually aware of the falsity of the statement, or that there was any such statement at all; whether if she had been aware of it, it would have made any difference or not, it is not material now to inquire, the Vice-Chancellor has taken the view that C knew perfectly well there was no means of paying the £20,000 except out of the creditor's property, he being then insolvent. In that sense, no doubt, the allegation against C is made out. But the wife did not know it, she was no party to it. She says she believed C to be a man wealthy and prosperous, he was the owner of one very large mill employing a great number of hands, he was senior partner in a firm which owned another large mill, and all that she expected was a settlement of £20,000. She gave valuable consideration—consideration of marriage. Whether that recital were in or out of the settlement, the covenant to settle the £20,000 in consideration of the marriage would have been a covenant for value, and would have prevailed against creditors. Why should the mere fact of the mere insertion of an inaccurate or untrue recital vitiate the settlement as regards the wife, who was ignorant and innocent of the fraud?" In *Columbine* v. *Penhall*,[2] Stuart, V. C. said, "Where there is evidence of an intent to defeat and delay creditors and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement." In *Bulmer* v. *Hunter*,[3] where a creditor impeached a voluntary settlement, one R. H. had been married three times, and was sixty-four years of age. His wife was forty-four years old. She had resided with R. H. and his former wife up to the death of the latter, and from that time up to their marriage she and R. H. lived alone together in his house, and

[1] L. R. 6 Ch. D. 38. [2] 1 Sim and Giff. 228 [3] L. R. 8 Eq. 46

cohabited together as man and wife for a period of upwards of seven years, when on the 15th of February 1867 a settlement was proposed in contemplation of marriage between her and R. H. whereby the whole of R. H.'s property, including his furniture and other effects were settled in trust for his intended wife for life for her separate use and there was a joint power for R. H. and the intended wife by deed to revoke any of the other trusts of the settlement and declare new trusts thereof. In the year 1847, the plaintiff had lent a sum of money to R. H. on his promissory note, and in January 1867 commenced an action against the latter. Notice of the action was given to R. H. on the 12th February 1867 or six days before the marriage, and the plaintiff obtained a verdict in the action for a large sum of money. The bill prayed a declaration that the settlement of the 15th February was fraudulent and void as against the plaintiff, and that it might be delivered up to be cancelled. Malins, V. C. there said, "The principles are plain. No doubt a man indebted to any extent may on his marriage make a settlement of his property, provided the settlement is made honestly and in good faith. But it is clearly established now that marriage cannot be made the means of committing fraud, though it is necessary to show that the intended wife was a party to the fraud to make a settlement invalid against the wife. Now, the facts I have to deal with are these, R. H., the settlor had been married three times. The third wife died in 1856, and the fourth wife had lived with him during the life of his third wife as his housekeeper, and returned to live with him again after the third wife's death. From the year 1860 she was, in fact, living in the same house and alone with him. She states in her affidavit that there had been an agreement that they should marry for some time before, but her illness had prevented it. There is, however, no evidence that she was ill, and I believe it was a mere pretence; and as they were living in the same house, if she was able to move about, they could have got married before, if they had wished it. There can be no doubt, in my opinion, upon the evidence that they were cohabiting together as man and wife for a long period before the marriage, and that there was no contemplation of a marriage taking place till after the notice of the trial was served upon the settlor. The plaintiff was a creditor of R. Hunter of long standing, and the interest upon the money being of great consequence to her, she frequently importuned him to pay her. He, on the other hand, tried to evade payment. Then, we find the notice of the trial was given on the 12th of February, and there is no doubt that the present wife must have known all about the transaction before the marriage; and her solicitor must also have had notice of all the facts. Under these circumstances, knowing that the verdict on the trial would be against him, his solicitor proposes a settlement which is executed on the 15th, by which, in consideration of the marriage got up for the mere purpose of giving colour and pretended value to the settlement, and pending the notice of trial, all his property is put into the settlement, and the marriage

takes place on the 18th of February. There was throughout these proceedings but one object, which was to commit fraud, and on the principle of *Columbine* v. *Penhall*,[1] and the other cases upon which that decision is founded, the settlement cannot be supported. The fact is, that the doctrine of the Court has been much modified in recent times, and is clearly my opinion that a marriage got up for the purpose of defrauding a man's creditors, where the intended wife is a party to the fraud, will not be supported." As a further illustration of the principle that valuable consideration is of no avail unless the transaction is also *bonâ fide*, there is the case of *Cadogan* v. *Kennett*.[2] LORD MANSFIELD lays down that "the principles or the rules of the Common Law, as now universally known and understood, are so strong against fraud in every shape, that the Common Law would have attained every end proposed by the statutes 13 Elizabeth, c. 5 and 27 Elizabeth, c. 4. The former of the statutes relates to creditors only; the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud. The statute Elizabeth, c. 5 which relates to frauds against creditors directs "that no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors. But then such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore, the statute does not militate against any transaction *bonâ fide*, and where there is no imagination of fraud. And so is the Common Law. But if the transaction be *not bonâ fide*, the circumstance of its being done for a *valuable consideration* will not *alone* take it out of the statute. I have known several cases where persons having given a fair and full price for goods, and where the *possession* was *actually changed*; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent and therefore void." LORD MANSFIELD relates this case in his decision: "A person with knowledge of the decree bought the house and goods belonging to the defendant and gave a full price for them; the Court upon that observed that, the purchase being with a manifest view to defeat the creditor, was fraudulent, and, therefore, notwithstanding a valuable consideration void. So, if a man knows of a judgment and execution, and with a view to defeat it purchases the debtor's goods, it is void, because the purpose is iniquitous. It is assisting one man to cheat another which the law will never allow." It seems, however, that the dictum of the Court in *Hall* v. *The Metropolitan Salmon Omnibus Company* which was decided in 1859 is scarcely in harmony with the principle here enunciated.[3] KINDERSELY, V. C. there said, "In my opinion the result of the evidence is that the sale was *bonâ fide* for a sufficient consideration, there is no ground for imputing fraud, or that the purchaser knew anything about the debtor's difficulty. Even if he had asked

[1] 1 Sim. and Giff., 228. [2] 2 Cowp. Rep 432, (1776). [3] L. I. 28 Ci 780.

the debtor why he wanted to sell, and the debtor had told him that it was to defeat an execution, that would have been no ground of impeaching the transaction." This dictum, it is submitted, appears to go too far, and is somewhat doubtful how far it is reconcileable with the explanation of the term "*bonâ fide*" which is given in *Butcher* v. *Stead*.[1] "The words *in good faith*," observes LORD CAIRNS, "means without notice of fraud or fraudulent preference." It would appear, however, that the dictum of Vice-Chancellor Kindersley in *Hall* v. *The Omnibus Company* was supported by the decision in *Wood* v. *Dixie*.[2] There, W had lent money to P to relieve him from an execution at the suit of N. Afterwards P, being unable to pay, executed a conveyance to W, the house and furniture to be taken at a valuation. The valuation was completed on a certain day, and then on the same day, the execution in B *v.* P was put in. It was contended that this conveyance was fraudulent as against B, the execution creditor. The direction to the jury was to the effect that if there really was a payment, still if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him. "We are clearly safe," observed DENMAN, C. J. on the motion for a new trial, "in going so far as to say that a mere intent to defeat a particular creditor does not constitute a fraud; we do not say that many considerations may not exist which would induce a jury to come to a conclusion which they have arrived at: but we hold the direction wrong. It would be going too far to tell the jury that assuming the fact of payment and the reality of the transaction, still if the intent was to defeat the execution creditor, the transaction was void."

However, in *Young* v. *Fletcher*,[3] a trader had transferred by bill of sale all his stock-in-trade to secure a debt owing to a creditor. The question there was whether he had thereby committed an act of bankruptcy under 12 and 13 Vict. c. 106, s. 67, and whether the stock-in-trade was not available as assets in insolvency. PIGOTT, B. said: "The necessary effect of the transfer was to defeat and delay the creditors. Every man is held to intend that which is the natural consequence of his action, and it was the natural consequence of this transfer to defeat and delay creditors. The remaining question is, was it fraudulent? It is contended on the part of the defendant that this word is important, and that the Court should be careful to attach an exact meaning to it. Now, all the authorities are agreed that it is not necessary to find moral fraud; but the question is, whether the tendency is to defeat and delay creditors, and to prevent an equal division of the bankrupt's property. In the case of *Wilson* v. *Day*, LORD MANSFIELD laid it down, that it was not necessary the deed should be fraudulent between the parties, "but it is made to prefer A. B. to the bankrupt's other creditors. This view has since been followed in numerous cases by numerous Judges."

[1] L. R. 7 House of Lords, 847. [2] 7 Q. B. 896, (1845). [3] 11 Jurist N. S. 449, (1865).

In *Robert Colett* v. *Radcliffe*,[1] LORD CHELMSFORD said that "in the course of the argument many cases were cited which had been determined in the English Courts under the statute 13 Elizabeth, c. 5, the Act for the protection of creditors against fraudulent deeds of their debtors; but decisions on this subject are of no practical utility, except where they establish principles which are of general application. Each case must depend upon its own circumstances, and, in all, the question is one of fact, whether the transaction was *bonâ fide* or was a contrivance to defraud creditors. It may, however, be stated generally that a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor, or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration; for, as is said in Twyne's case,[2] a good consideration does not suffice if it be not also *bonâ fide*. The question is in all these cases—was the deed executed *bonâ fide* and for valuable consideration?"

Thus, the principal question in all these cases is, whether the transaction was *bonâ fide* or not. In other words, what were the circumstances of the settlor or transferrer at the time of the settlement or the transfer, and whether the donee or transferree was aware of the fraud upon creditors. There seems to be a consensus of opinion, and the authorities are at all events agreed that where the circumstances of a man being indebted, he makes a voluntary conveyance, it is an argument of fraud, and it matters little whether the donee was aware of the circumstance or not; but the point in every case is whether the act done is a *bonâ fide* transaction, or whether it is a trick and contrivance to defeat creditors.[3] In a conveyance of value, the knowledge of the transferree is essential in order to set the transaction aside.

It ought to be mentioned that a grossly inadequate price is a badge of fraud in a conveyance, or, at all events, where a transfer is made for a grossly inadequate price, the transfer is regarded as a mere voluntary transfer. In *Strong* v. *Strong*,[4] a leasehold yielding a surplus of £178 was sold for a life annuity of 60£ at a time when the parties to the assignment were fully aware that the grantor was on his death-bed. SIR JOHN ROMILLY, M. R. there held that the effect of the transfer was to defeat all the creditors of the grantor, and the assignment was accordingly set aside for their benefit. It should be noted that where the transaction is *bonâ fide*, it need not be full.[5]

[1] 14 Moo. P. C. 121, (1860).

[2] 3 Co. Rep. 80.

[3] Note the observations of LORD MANSFIELD in *Cadogan* v. *Kennett* 2 Cowp. Rep. 432.

[4] 18 Beav 408, (1854).

[5] *Per* Aston, J. in *Doe* v. *Routledge*, 2 Cowp. Rep. 710.

In *Doe* v. *Routledge*[1] the observations of LORD MANSFIELD are worthy of consideration. "The title of the statute," proceeded that learned Judge, "is against covinous and fraudulent conveyances, *i. e.*, where nominally one man passes, and where nominally his estate is conveyed to another; but when in fact it is agreed that the grantor shall keep it to his own use, and so to answer other purposes of fraud. The enacting part considers it in the same light, and makes an express provision for such practices, as if they were a crime. For it says that "all parties to such fraudulent grants who shall attempt to defend the same, shall forfeit one year's value of the lands, so purchased, and also being lawfully convicted, shall suffer six months' imprisonment. But no person making a voluntary settlement by way of provision for his family was ever considered in that criminal light. Where a fraudulent use is made of a settlement, that, indeed, may be carried back to the time when the fraud commenced. A custom has prevailed and leant extremely to construe voluntary settlements fraudulent against creditors. But if the circumstances of the transaction show it was not fraudulent at the time, it is not within the meaning of the statute, though no money was paid. *One great circumstance which should always be attended to in these transactions is* whether the person was indebted at the time he made the settlement: if he was it is a strong badge of fraud."

In *Holmes* v. *Penney*,[2] it was said that as to the statute of Elizabeth, the mere circumstance of a settlement being voluntary does not make it fraudulent against creditors. There must be other and concurrent circumstances, such as large and unpaid debts, and the fact of the settlor being, if not actually insolvent, so much so as to lead the court to suppose that his creditors will necessarily be delayed, and, therefore, fraud may be presumed.

In *Graham* v. *Furber*,[3] a person being in difficulties and indebted to several creditors who had writs of *fi fa* against him conveyed all his goods to another by a bill of sale on the understanding that the seller should have an opportunity of repurchasing them, the goods remained on the seller's premises. The buyer had paid over the money, which was appropriated in discharge of the execution. CRESSWELL, J. with the approbation of the full Court observed:—"Nobody could doubt the character of the transaction. The debtor was in difficulties, the purchase of his goods by the other was evidently an act of kindness with a view to enable the debtor to extricate himself, but then it was quite apparent that the debtor had at the time other creditors who had demands upon him, besides those who had obtained execution. The transaction, therefore, was clearly void under the statute 13 Elizabeth, c. 5.

Note, however, the decision in *Alton* v. *Harrison*.[4] There the defendant

[1] 2 Cowp. Rep 710, 711, 712, (1777).

[2] *Per* Wood, V. C. 26 L. J Ch. 181, (1857).

[3] 14 C. B. 411, 412, 413, (1854).

[4] L. R. 4 Ch. Ap. 623, (1869).

executed a deed of mortgage in favour of some of his creditors at a time when he knew that a writ of sequestration would be issued against him for non-payment of a sum of money ordered to be paid by him into the Court of Chancery. STUART, V.C. with the approval of GIFFARD, L. J. observed:—"In this as in all other cases of the same kind, the question is as to the *bonâ fides* of the transaction. If the deed of mortgage was executed by the defendant honestly for the purpose of giving a security to the five creditors, and not a contrivance resorted to for his own personal benefit, it is not void and must have effect." It should be observed that in this case as well as in the case of *Wood* v. *Dixie* the object of the debtor was not to obtain any benefit for himself; but to part with proprietary rights in favour of persons to whom he was already indebted. It is, nevertheless, impossible to overlook the circumstance that the transaction was one which was characterized by generosity towards one creditor and illiberality towards another.

In *Darvill* v. *Terry*,[1] one Bently executed a bill of sale by way of mortgage of certain goods in his possession as a security for a sum of 13£ previously lent him by the plaintiff, and a further loan of 100£. By the terms of the deed the above sums were to be repaid with interest on a stipulated day, and until default in payment Bently was to keep possession of the goods. Soon after the execution of the bill of sale, Bently presented a petition to the Court of Bankruptcy for an arrangement with his creditors which was, however, dismissed. And the sheriff seized the goods of Bently under a writ of *fi fa* issued in a judgment obtained against him by the defendant. The Court said that if the parties really intended that what the bill of sale really purported to be, namely, in consideration of money advanced, to pass the property on the goods to the plaintiff though with the right in Bently to retain possession of the goods until default in payment of the money advanced, it was no objection to the bill of sale that the parties had come to that arrangement with a view of defeating the defendant's execution. On a motion for new trial, the point urged was, "whether it was the intention of the parties to vest the property of the goods in the plaintiff is not the question; but whether the deed was meant to protect the goods of the debtor if the execution creditor attempted to assert his right. POLLOCK, C. B. there observed:—"Thus if the mortgage was *bonâ fide* for the consideration of 160£, and the money was actually paid, the transaction may well be sustained under the present view of the law, which had varied from that as laid down in the earlier cases."

You have already seen that settlements in contemplation of marriage are transfers for value; but post-nuptial settlements have nothing but the consideration of affection to support them. It appears, however, that at one time there

[1] 6 H. and N., 837.

was some leaning in respect of settlements in favour of wife and children, even though such settlements would merely be of a voluntary character. That circumstance is alluded to in *Neale* v. *Day*.[1] "With regard to the older authorities," it was observed in that case "there are several in the books, by which it appears that where property has been voluntarily assigned, which could not have been reached by the creditors, it was considered not to be within the meaning of the statute, and on that ground a purchase in the name of a wife or child was considered not to be within the statute inasmuch as the settlor might have given them the money; and in commenting upon those authorities LORD ST. LEONARDS remarks :—"It has been strenuously argued that such a purchase is not within the operation of the statute of the 13 Elizabeth, c. 5; for as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him; and this seems to be the better opinion when the case is clear of fraud;" but in *French* v. *French*,[2] where a person made over his business, stock-in-trade and fixtures in consideration of a sum of money paid down and an annuity to be paid to himself during the joint lives of himself and the purchaser, and afterwards a smaller annuity to his wife, in case she survived him, with power to himself to dispose of his wife's annuity, the annuity so payable to the widow was considered to be just in the same light as if it were taken and applied to his own purposes and abstracted from his creditors, and in the opinion of the LORD CHANCELLOR, amounted to a voluntary settlement in favour of the wife." WOOD, V. C., then proceeded to observe :—"It appears to me in the first place that *French* v. *French* is precisely the case before me, and, therefore, conclusive of the question, and, in the next place, if that case were out of the way, it appears to me that the real test is, whether or not a fraud upon the creditors was intended in the transaction. In this case, it is in effect a contract by which the debtor is making sale of his property by means of a covenant that he will abstain from carrying on business, and taking a settlement of the purchase money upon his wife for life for her separate use with the immediate remainder to himself for life; the whole object plainly being to obtain the benefit of the entire property for his own use and advantage. Even upon the older aut[illegible] ties alone, it is very questionable whether such a transaction would [illegible] fraud within the direct purview of the statute; but independently [illegible] case of *French* v. *French* is an authority precisely in point, and I [illegible]

The case of *Christy* v. *Courteney*[3] may be referred to wi[illegible] question how far a conveyance in the name of a child will [illegible] the creditors of the father. "The rule of law" obs[illegible] that where a father purchases property with m[illegible]

[1] 28 L. J. Chancery 47, (1859). [2] 6 De Gex, M[illegible]

conveyance in the name of his child, the law presumes it to be an advancement for the child, and not a trust for the father; those who allege that it is a trust for the father are bound to prove it, and the evidence to be relied on for that purpose consists mainly, if not exclusively, of contemporaneous circumstances which took place at the time of the transaction. If the father's circumstances permitted it, the transaction would amount to preferments or advancement of the son and not to trusts for the benefit of the father."

The question, however, the determination of which has originated some doubt is what must be the extent of a man's indebtedness at the time in order to set aside his voluntary settlements or gifts against his creditors, and how far will a man's voluntary settlements or gifts avail against subsequent purchasers and creditors?

In *Walker* v. *Burroughs*,[1] LORD HARDWICKE is reported to have observed:—"It has been said that all voluntary settlements are void against creditors, equally the same as they are against subsequent purchasers under the statute 27 Elizabeth, c. 4, but this will not hold, for there is always a distinction upon the two statutes. It is necessary on the 13th Elizabeth, to prove at the making of the settlement that the person conveying was indebted at the time, or immediately after the execution of the deed, or otherwise it would be attended with bad consequences, because the statute extends to goods and chattels, and such construction would defeat every provision for children and families, though the father was not indebted at the time." Note the distinction here drawn between cases under statute 27 Elizabeth and 13 Elizabeth, and it should be noted that statute 27 Elizabeth relates to immoveable property alone.

In *Holloway* v. *Millard*,[2] it was argued on one side that voluntary conveyances in favour of strangers were void against subsequent creditors, for, if it were not so, great frauds might be practised, and a person would be enabled to secure his property against all the accidents of life. Whereas, it was urged, on the other hand, that a man must be indebted, and largely so, at the time to render such a settlement invalid, and that mere trifling debts which a person of fortune in the course of house-keeping must unavoidably incur, would not be sufficient. [illegible]n this argument, PLUMER, V. C. said that "a conveyance is not fraudulent [illegible] because it is voluntary. A voluntary conveyance may be made of real [illegible] property without any consideration whatever, and cannot be avoided [illegible] creditors, unless it be of the description mentioned in the statute; [illegible] 000£ a year and not indebted at the time, gives away 500£ [illegible]t fraudulent, unless it were made with an intent to defeat [illegible] being voluntary is *primâ facie* evidence, when the [illegible] at the time, of an intent to defeat and defraud his

[2] 1 Mad. 414, (1816).

creditors; but if unindebted, his disposition is good. It is clear, therefore, from the authorities that a voluntary settlement of real or personal property by a person not indebted at the time, nor meaning a fraud, is good against subsequent creditors.

The decision in *Holloway* v. *Millard* is well exemplified by *Barling* v. *Bishopp*.[1] There, an action of trespass was brought against the grantor who, having received notice of the trial, voluntarily granted, some seventeen days before the actual trial, all his property to his daughter. The action was tried and the grantor became indebted to the amount of 150£. When the time came to levy execution, the debtor was found to possess nothing. ROMILLY, M. R. there said:—"There are many modes by which a person may be hindered of his just and lawful actions, debts and damages, and by which creditors may be defrauded, though the grantor may not be indebted at the time. A man, not indebted and of good credit, may make conveyance of property to his son or daughter, and immediately after borrow a large sum of money, and having spent or made away with it, take the benefit of the Act. If this is done simultaneously, it would be impossible to say that it was not done with intent to defraud his creditors. Every man knows that he cannot go to law without incurring some expense. This deed was to provide for the worst which might happen, by conveying away his property beforehand. I am of opinion that the effect of the deed was to defeat persons who might become his creditors, and was executed in favour of his daughter, who it is clear would not allow her father to starve." This, it will be readily seen, furnishes an instance of what one is familiar with in this country as a *benami* or quasi-*benami* transaction. The substance of the English authorities is this that "when a person indebted makes a conveyance of a real or chattel interest for the benefit of a child without the consideration of marriage or other valuable consideration and dies indebted afterwards but that shall take place; there is certainly a difference between the statutes of fraud of the 13th Elizabeth which is in favour of creditors, and the 27th Elizabeth which is in favour of purchasers. On the 27th Elizabeth, every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration. The difference between that and the 13th Elizabeth is this: if there is a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of

[1] 29 Beav. 419, (1860).

fraud or collusion or intent to deceive subsequent creditors appears that will make it void; otherwise not, but it will stand, though afterwards he becomes indebted; but there is no case on the statute of 13th Elizabeth where a man indebted at the time makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for benefit of his creditors. A man actually indebted, and conveying voluntarily always means in fraud of creditors."[1]

The important decision in *Spirett* v. *Willows*[2] is well worthy of consideration. LORD WESTBURY'S observations were to this effect: "The plaintiff sues as a creditor to set aside a voluntary settlement or deed of gift made by the defendant, his debtor. The plaintiff's debt was contracted before the time of making the settlement. He has since recovered judgment at law. The plaintiff complains, in the words of the statute of Elizabeth, that his judgment and execution are 'hindered, delayed, and defrauded' by the conveyance of the goods and chattels of his debtor made by his voluntary settlement. The defence is that at the time of making the settlement the debtor reserved and had property enough to pay the plaintiff and all his other creditors in full, and that the settlement, therefore, is not fraudulent, because the debtor remained solvent after he had made it. There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded. If the debt of the creditors, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement, the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts; that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors and is fraudulent and void. It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement, or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby, in the event, the remedies of creditors whose debts existed at the time are delayed, hindered, or defrauded. I am therefore of opinion that this settlement is void

[1] *Per Lord Langdale in Christy* v. *Courteney*, 13 Beav. 98.

[2] L. J. 34 Chancery, 367, (1865).

as against the plaintiff." This decision may be read with advantage in connection with the doubt which was thrown out in *Holmes* v. *Penny*,[1] where WOOD, V. C., had said that it was perhaps a question which still remained to be determined "whether the fact of a settlement being voluntary will make it fraudulent against subsequent creditors."

The decision in *Spirett* v. *Willows* was fully explained, if not actually criticised, and, it would seem, perhaps reluctantly followed, by Vice-Chancellor JAMES in *Freeman* v. *Pope*.[2] In that case, although expressing his satisfaction upon the facts, "that the settlor had not any idea whatever of defrauding or cheating his creditors by making a settlement in favour of his god-daughter of a policy of assurance, which he had made several years before in his favour, when there was no pretence for supposing that he was at all in embarrassed circumstances, the learned Judge thus proceeded to remark on the authorities:—"There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded:—if the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement, that is to say, it is immaterial whether the debtor had any intention whatever of defeating his creditors; but if, in the result, from some accident, a small debt remained unpaid for some years, and by reason of a voluntary settlement and subsequent insolvency of the debtor the creditor was delayed in the payment of his debt, then, however honest the settlement was, however solvent the settlor was at the time, if at the time he had 100,000£ and put 100£ in the settlement, and a creditor for, say, 10£ happened to be unpaid in consequence of the settlor losing his money in the interval, that would be quite sufficient to set aside the settlement. That is the decision of LORD WESTBURY, and I am bound by that decision." Such being the *ratio decidendi* in *Spirett* v. *Willows*, it is clear that that decision marks a departure from the principle of the Roman law on the subject. We have already premised that, under the Roman law, a voluntary settlement is then only avoidable at the instance of a creditor if the settlor should have comprised all his estate in the settlement. Mark the words of the illustration in the Digest:[3] "*Qui creditores habere se scit, et universa bonâ alienavit.*" Mr. May, in his most useful treatise on Fraudulent Alienations, thus expresses himself with regard to the principle of decision in *Spirett* v. *Willows*:—"It is impossible not to see the weight of the argument of JAMES, V. C., and it would be difficult to reconcile the decision in *Spirett* v. *Willows* with a large number of

[1] 26 L J. Chancery, 181.

[2] L. R. 9 Eq 211, (1869).

[3] D. 42, 8, 17, 1.

authorities which do not appear to have been cited or considered in that case and which that case (if law) must be considered as overruling."[1] The current notion seems to be that in order to avoid a voluntary settlement as being in fraud of creditors, it is not sufficient that the settlor should be merely indebted at the time; but he must actually be in embarrassed circumstances.[2] "There is," says GIFFARD, L. J. in *Freeman* v. *Pope*,[3] "one class of cases, no doubt, in which an actual and express intent is necessary to be proved, that is, in cases where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, there the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended by making the voluntary settlement to defeat and delay them."

On the whole, it is, on the one hand, very difficult, to use the words of LORD MANSFIELD, against fair honest creditors to support a voluntary settlement[4]; but, at the same time, in the language of TURNER, V. C., those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have a task of great difficulty to perform.[5]

In British India, the principle of the statutes of Elizabeth has been fully recognized, although perhaps somewhat tacitly in the mofussil. In *Enaet Ali* v. *Rampreah*,[6] the question for determination was whether a voluntary settlement or gift in favour of a wife was under the circumstances good against subsequent creditors. The facts were that at the time of the gift the husband although he owed some debts was possessed of property, far more than enough to pay those debts, that the wife was in possession under the gift, and the plaintiff became a creditor of the husband long after the gift. The court sustained the gift, observing that "at the time of the settlement the husband was thoroughly solvent, that the party who now claims the property so settled, having the full knowledge or means of knowledge of the settlement, nevertheless afterwards chose to deal with the husband and lend him money, and that in truth the transfer of the property to the wife was in no way fraudulent or designed to

[1] May: Law of Voluntary and Fraudulent Alienations of Property, 43.

[2] *Ibid*, pp. 40—41.

[3] L. R. 5 Ch. Ap. 538.

[4] *Doe* v *Routledge*, 2 Cowp Rep, 706.

[5] *Harman* v. *Richards*, 10 Hare, 81.

[6] 1 W. R 21, (1864).

defeat creditors. It may well be that, looking to the great risk of fraud in such cases, and the difficulty of proving it, *it might be desirable by statute* to render such voluntary settlements void against all creditors present or future." It should be noted that in the statute of Elizabeth the words "creditors and others" have been construed to include persons who are creditors at the time of the gift as well as those who may become creditors afterwards, or in other words, creditors both present and future.[1]

The common device in this country of defrauding creditors is by means of *benami* or *furzi* transactions, that is to say, either conveyances are taken in the name of a person other than the person who pays the consideration money and intends to hold the property, or gifts or *hibbas* are clandestinely made to friends, relatives or servants in order to disappoint present or future creditors. Note the observations of SIR ERSKINE PERRY in *Musadee Mahomed Cazum Sherazee* v. *Mirza Ally Mahomed Khan*[2] :—" The question to be determined in this case is, whether the conveyance of a moiety of Aga Mahomed Rahim's dockyard, in December, 1845, to Mushadee Cazum, was a *bonâ fide* sale, or whether it was a simulated transaction between the parties for the purpose of defeating Rahim's creditors, and particularly his old opponent, Mirza Ally. In order to be in a condition to form an accurate judgment on this question, it is necessary to have a distinct picture before our eyes of the position of the principal actors in the transaction at the period when it occurred. That in November, 1845, a decree against Aga Mahomed Rahim for very many lacs of rupees was about to be given, that in the same month he was charged before this court with an attempt to abscond, and to withdraw all his moveable property from the jurisdiction, in order to defeat the decree; that the court believed the charge and ordered his arrest, although the Aga gave the court to understand that it was wholly untrue, and that he was a man of a very large property, and equal and willing to satisfy the claim of his creditors in the case. It is also necessary to observe that when this decree came on subsequently to be enforced, all the property which the Aga previously had sworn to, disappeared, and when execution issued against the greatest Mogul merchant of Bombay, one who had been the host of governors, judges, and all the society of the Island, who had been for many years the agent for the great Mussulman princes of Western Asia, and whose large possessions in landed property, in ships, and other substantial *indicia* of wealth were patent to the eyes of all, not one single rupee was forthcoming, or voluntarily paid by him in satisfaction of the claim of the young man whose property had been in his hands for years, and which had been the foundation of all his prosperity. On legal inquiry it turns

[1] See *Taylor* v. *Jones*, 2 Atk. 602, (1743).

[2] This was a Bombay case decided on the 14th Nov. 1848. 6 M. I. A. 35, 36, 37, 38.

out that the landed and other property, which was well-known to belong to Aga Mahomed Rahim, has all been conveyed to other parties, and the question, therefore, arises on every such conveyance, whether there was really a *bonâ fide* transfer of property for good consideration, or whether a deep-laid scheme was concocted, for the purpose of defeating the course of law, for cheating the claimant, whom he had been keeping at arms' length for a course of years by harassing litigation, and by using those provisions in the English Law which are intended for the relief of honest but unfortunate debtors, to withdraw all his property which could be realised from within the jurisdiction of the court, and himself finally, as soon as he should have got his discharge under the Insolvent Act. This being the statement of the question before the Court, it is obvious that any claimant to property, conveyed by Aga Mahomed Rahim at the period of his difficulties, labours under the *onus* of having to maintain a case which is open to the gravest suspicions. The probabilities are all against the genuineness of such a transaction, for it does not require a very long experience in this court, to be aware that fraudulent conveyances, tortuous courses, skilful deep-laid schemes, and most unblushing perjury, are constantly resorted to by persons in difficulties, whereas the same prudence in *bonâ fide* transactions, and the same care to make good bargains, and not to part with hard cash till a valid equivalent is obtained, are undoubtedly to be found amongst the natives of India to quite as great an extent as with any nation in the world. The conclusion which I desire to draw from this observation is, that as the plaintiff's case is necessarily tainted with suspicion, it lies upon him, if the transaction be really a genuine one, to bring more than an ordinary amount of evidence to support it, and to rebut by unimpeachable testimony, the *primâ facie* incredibility which accompanies his tale The large sum of money involved in this case (at least four lacs according to the plaintiff, but probably not amounting, even with the arrears of rent, to more than two) affords quite sufficient motive to the plaintiff to make every exertion to bring forward all the evidence which is capable of being given; and I have no doubt whatever in my mind that the plaintiff has brought forward all the evidence which was calculated to support his claim. Having thus stated the question for inquiry, and the position of the parties at the period of the transaction, and having pointed out how extremely suspicious a case the plaintiff was coming forward to support, and the consequent burden upon him of furnishing the Court with a mass of irrefragable evidence, I make no hesitation in avowing, that directly I heard the speech of the learned Counsel for the plaintiff, and ascertained that a case, in itself suspicious, was accompanied with the most improbable details, and that these details had absolutely no witness at all to prove them; I felt no doubt whatever that the defendant was entitled to a verdict and that the conveyance was altogether simulated and fraudulent."

In *Roshun Bibee* v. *Kureem Bux*,[1] the legal heirs of one Kalor sought to obtain possession of their share of his property from the widow of Kalor who was in possession under a deed of gift alleged to have been executed by Kalor in her favour in lieu of dower. The widow was admittedly in possession, the plaintiff alleged that the *hibbanama* or deed of gift was *benami*. It was found that the transfer to the wife was for a fraudulent purpose; but in the view of the court, the legal representatives of Kalor were bound by his act, that is, the deed must hold against them, though it would be no bar to any creditor seeking to recover his dues from the property in the possession of the widow.

In *Uzhar Ali* v. *Ultaf Fatima*,[2] "it is perfectly clear," in the words of SIR JAMES COLVILLE, "that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among Mahomedans as among Hindus, and the criterion of these cases in India is to consider from what source the purchase money comes; that the presumption is that purchase made with the money of A, in the name of B, is for the benefit of A, and that from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that son."

In *Azimat Ali Khan* v. *Hurdwaree Mull*,[3] it was said that it was the duty of a court of justice to put the objector to the right of creditor founded on apparent ownership to strict proof of his objection, he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family property out of reach of creditors. If the father became indebted, the titular right would be then stated to have conveyed the real interest, but if the son were indebted, then the claim would take the form that the son was a mere titular owner.

A gift to an idol or a wife, being mere volunteers, in other words, transferees without valuable consideration is of no effect as against the creditors of the donee.[4]

The applicability of the statutes of Elizabeth to the administration of justice in British India and the universal application of the principles there embodied were fully explained by their Lordships of the Judicial Committee in *Abdul Hye* v. *Mahomed Mozaffar Hossain*.[5] The judgment was substantially to this effect:—"The present proceeding relates to the execution of a decree against Abdul Ali, obtained so far back as 1866 by some of the representatives of his deceased wife Ifthakharunnissa, and in respect of which a very considerable

[1] 4 W. R, 12.

[2] 13 M. I A. 232, (1869).

[3] 13 M. I. A. 395, (1870).

[4] *Soshikishore Bandyopadhya* v. *Chooramoney Putto*, W. R. (Gap. number), 170, (1864).

[5] I. L. R. 10 Cal. (P. C.), 618.

sum is still due. The main question for consideration is whether certain property which the decreeholders have attached, and which they seek to recover, formed part of the assets of Abdul Ali at the time of his death, and is liable to his creditors; and the answer to this question depends on whether a certain *hibbanama*, dated 19th Assin 1256, (4th October 1849), made by Abdul Ali in favour of his son Wahed Ali, is *benami*, or is fraudulent and void as against his creditors; and in order to determine these questions, it is necessary to examine the position of Abdul Ali and the condition of his family when that gift was executed. Abdul Ali was a zemindar, and prior to 1849 had married twice, first Ifthakharunnissa, and secondly, Nurunnissa, by whom he had a son, Wahed Ali, and a daughter. In October 1849, he was under a considerable liability for the dower of Ifthakharunnissa, so large that after her decease two of her representatives (the present decreeholders) obtained a decree as for their share for Rs. 62,000. He was, in 1849, the owner of a variety of small properties, collectively of considerable value, but probably not more than sufficient to enable him to meet his engagements; and being thus situated, he appears, voluntarily and without any consideration, to have made the *hibbanama* of the 4th October 1849. This grant appears to have been duly registered; but the instrument remained in the hands of Abdul Ali, and never appears to have been in possession of or under the dominion of the grantee. Wahed Ali was then but ten years of age, and his father Abdul, continued in the possession and apparent ownership of the property granted, and took and received and applied to his own use the whole of the income and profits. He appears to have continued in such possession to the time of his death. The property comprised in the gift seemed to have been substantially the bulk of Abdul's then assets; and certainly, if that gift was to take effect, he left himself without the means of meeting his then existing liabilities. The gift was not followed or completed by any actual change of possession, or of management, or apparent ownership. After the death of Abdul, the decreeholders sought execution against his assets, and, *inter alia*, against parts of the property included in the *hibbanama* of 19th Assin 1256, (4th October 1849), which they contend is *benami*, that is to say, they allege that it was a transaction not intended to operate according to its tenor and effect, but merely as a cover from creditors, and further that it was fraudulent and void against creditors. If they are correct in those contentions that instrument cannot stand in their way; the property remained the property of Abdul. The questions which their Lordships have to determine are, whether the gift of 1849 was one of those known as a *benami* transaction, or was it otherwise fraudulent and void as against the decreeholders, whose decree was obtained in respect of a pecuniary liability existing at the time of the grant and still undischarged. On a fair and full consideration of the state of circumstances existing at the time of that *hibba*, and the course of conduct pursued afterwards,

their Lordships are clearly of opinion that it was a *benâmi* to this extent, that it was a mere pocket instrument, not intended to operate according to its tenor and effect, but by which property was put in the name of Wahed, but for the benefit of Abdul. The possession remained with Abdul, and he appears during his life to have acted as uncontrolled owner and for his own sole benefit. There is some remarkable documentary evidence too from which it appears that after the *hibba*, there having been from time to time accretions to the lands comprised in the *hibba*, and which according to the law of India follow the principal, those accretions were claimed by Abdul, and he obtained grants of them to him and his heirs. The *hibba* was not, and could not, be dealt with as a family settlement; there does not appear to have been any occasion for it, and the grantee was a boy of ten, who is afterwards made to sign an *ikrar*, by the concluding provision of which, it is declared that the property is to remain in the control and management of Abdul during his life, and that neither Wahed nor his heirs should lay claim thereto. But, supposing the *hibba* to be operative as between the parties, their Lordships have still to consider whether it is to be upheld as against creditors. By statute 13 Elizabeth, c. 5, all covinous conveyances, gifts, and alienations of lands or goods whereby creditors might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared utterly void. Whether or not that statute (which may not extend to or operate in the mofussil in India) is more than declaratory of the Common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the Common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience. They have come to the conclusion that the *hibba* of 1849 was a covinous instrument, not made *bonâ fide* or on any good consideration, and by which creditors (the holders of the decrees) have been delayed in their just rights; and taking the whole transaction together, they are of opinion that the intention of the settlor was to protect the property from those who were his creditors at the time. Their Lordships are of opinion that according to equity and good conscience the *hibba* is fraudulent and void as against creditors."

In *Pogose* v. *The Delhi and London Banking Co.*,[1] the Court after a careful review of the English authorities on the subject, laid down that there was no distinction between marriage and any other valuable consideration, and the same good faith which was necessary to support a transfer for valuable consideration as against the claims of creditors was equally requisite when the consideration was that of marriage. It was there cited on behalf of the

[1] I. L R 10 Cal, 960.

wife, the donee, that before an ante-nuptial settlement could be set aside, it must be proved (*a*) that the husband was insolvent, or, at any rate, hopelessly indebted at the time of the marriage, (*b*) that the marriage itself was a fraudulent contrivance for defrauding the husband's creditors, (*c*) that the wife not only knew of her husband's indebtedness, but was herself privy to the fraud, and it was specially urged in the case (*d*) that the knowledge of a minor wife's parents or guardians could not for that purpose be taken to be her own knowledge, and that in order to avoid the deed, actual notice of the fraud must be brought home to the wife herself. GARTH, C. J., thus proceeded to observe:—"It is true that in *Colombine* v. *Penhall*[1] and *Bulwar* v. *Hunter*[2] the settlements were held to be void upon the ground that *the marriage itself*, as well as the settlements, was part of the scheme for defrauding the creditors. But we do not understand that in either of those cases the Court intended to say that, unless the marriage itself was part of the fraud, the settlement could not be avoided. If any such opinion had been expressed by the Court in either of those cases, it would certainly have been unnecessary for the purposes of the decision, because in both, there had been previous cohabitation between the husband and wife, and it was found as a fact that the marriage itself was a part of the scheme to defraud. This of course made the argument so much stronger against the validity of the settlements. But it does not follow from these cases that when the marriage itself has been arranged in good faith, the settlement, if it is found to have been made for the purpose of defeating creditors, cannot be avoided. If that were so, it would be making marriage settlements the one single exception to the law laid down by the statutes of Elizabeth. Take a case, for instance, of this kind. Suppose that a marriage has been agreed upon in good faith, at a time when the intended husband was perfectly solvent; and that a settlement of a part of his property has been arranged upon the usual terms Suppose, also, that before the marriage takes place, a change comes over the husband's fortunes. He has executions out against him, and becomes nearly, if not wholly, insolvent; whereupon the scheme of the proposed settlement is changed, and the whole of the husband's property is settled upon the wife, with her knowledge and connivance, for the express purpose of defrauding the husband's creditors. Can it be that such a settlement would be valid as against the creditors? If it were so, there would certainly be one law applicable to marriage settlements, and another applicable to all other conveyances. Of course, for the purpose of avoiding ante-nuptial settlements, it must be shewn that the wife was actually or constructively a party to the fraud. If she were not so, she would be a *bonâ fide* purchaser without notice. In the case of *Kevan* v. *Crawford*,[3] the wife was found entirely ignorant of the fraud, upon

[1] 1 Sm. and G, 228. [2] L. R., 8 Eq, 46. [3] L. R. 6 Ch. D., 29.

which the settlement was based, and in *Campion* v. *Cotton*, it was found that no fraud was established. Every case, as it seems to us, must depend upon its own circumstances; and we certainly find no warrant in the authorities for excluding contracts made in consideration of marriage from the law which governs all other contracts. It has been said that the statute of Elizabeth is not in force in the Indian mofussil; and in strictness perhaps that may be true. But that statute, in the opinion of LORD MANSFIELD, was only declaratory of the Common law. The principles of it are undoubtedly those of equity and good conscience, and their Lordships of the Privy Council have expressly sanctioned the adoption in the mofussil of these principles. In the late case of *Abdul Hye* v. *Mir Mahammad Mozaffar Hossein*,[1] speaking of the Statute of Elizabeth, their Lordships say:—"There seems to be no doubt that its principles and the principles of the Common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience." We have therefore to consider in this case, whether, having regard to the circumstances under which the settlement was made, it operates to protect the property in question against the defendant's execution. The plaintiff at the time of the marriage was sixteen years of age, and we are told by her parents that the proposals for the marriage took place in 1876, about a year before the marriage. No arrangement was at that time made or suggested about any settlement. The defendant's decree, as we have seen, was passed in June 1877. The agreement by Mr. Pogose with the Bank was on the 21st of June; and almost immediately after this agreement, about four months before the marriage, we find this settlement arranged for the first time. It is obviously a settlement of a very unusual character; and although we cannot doubt some professional gentleman was employed in the matter, no such person is called as a witness, nor is any explanation given of the unusual character of the document. It professes to denude Mr. Pogose of the whole of his property of every description. This is proved by the plaintiff's own witnesses. He had a one-seventh share of his mother's property, which consisted of an 8-anna share in an estate in Mymensingh (the property in question), and in four other smaller properties in Backergunge. The whole of this one-seventh share was settled. There was no honest reason, so far as we can see, why Mr. Pogose should have so completely denuded himself; and it does not appear that MRS. Pogose brought anything whatever into settlement. The instrument upon the face of it, is called a deed of gift. It recites a promise by Mr. Pogose that, in consideration of the intended marriage, he should convey to his wife all "his rights and interests in the property, to the intent that she should become the owner and enjoy the

[1] I. L. R., 10 Cal., 616; L. R. 11 I. A., 10.

profits thereof; that she (the wife) should support him (the husband) for life; that she should not alienate the properties; and that on her death the children of the marriage should have a right of disposing of the property by gift or sale, and that from *henceforth* (that is to say, from the time of the execution of the deed) all his (the husband's) rights in the property should cease to exist." The deed then goes on to convey the property to the wife to and for the above intents and purposes. Then we have seen, that Mr. Pogose's debts amounted at least to Rs. 17,000 at the date of his marriage, so that he was at that time almost, if not wholly, insolvent. It now only remains to be seen, how far the plaintiff herself, or those who acted for her in making the settlement, were party or privy to the fraud. The whole history of the transaction from first to last tends to satisfy us, that all the parties to the transaction were cognizant of Mr. Pogose's difficulties, and that the alleged settlement was only a device for the purpose of defeating his creditors, and retaining the settled properties in his own possession. In the first place, as we have already pointed out, there was nothing said about a settlement when the marriage was first arranged. It was negotiated in the year 1876; but it was not until the Bank had obtained their decree against Mr. Pogose, and he had been threatened with an attachment, and had entered into the agreement of the 21st of June, that the settlement in question was thought of. Then it must be borne in mind, the Manooks were nearly related to the Pogose family. They must have known perfectly well, what was notorious throughout the country at that time, that Mr. Pogose's father, who was once a man of fortune, had become hopelessly insolvent. Mr. Manook could hardly, under such circumstances, have allowed his daughter to marry Mr. Pogose without ascertaining his pecuniary position. And considering that Mr. Pogose's Babus were perfectly aware of his indebtedness, it seems impossible to suppose that Mr. Manook should not have known it. It has been contended that, in order to avoid the settlement against Mrs. Pogose and her children, it was necessary to shew that she herself was a party to the fraud; and that, however fraudulent the conduct of her father may have been, that would not avoid the settlement as against her. But no authority had been adduced in favour of this contention; and, so far as it is necessary for us to decide the point, we consider that it is not warranted by law. If a guardian, whilst acting for a minor, is guilty of a fraud or illegality in contracts which he makes on the minor's behalf, the minor can no more enforce such contracts, than the guardian could, if he were acting on his own behalf. If a guardian, for instance, in making a lease of the minor's property, were guilty of such fraud as against the proposed lessee as would justify the lessee in repudiating the lease, the minor could no more enforce the lease as against the lessee, than the guardian could, if he were acting for himself. This proposition was in fact admitted in the course of the argument. Then what

is the state of things here? Mrs. Pogose is attempting, as against the creditors of her husband, to enforce a marriage settlement, which had been negotiated and made on her behalf by her father as guardian. If her father, under these circumstances, makes a contract for her, which is contrary to law, or void against third persons, on the ground of public policy, we consider that she can no more enforce such a contract against those third persons, than if she, being an adult, had made the contract for herself. It may be true that no suit can be brought against a minor for any fraud or misrepresentation of which his guardian has been guilty, but that is a different matter. A minor may not be answerable on the one hand for the fraud of his guardian, but on the other hand, he cannot take advantage of it. In this case we are satisfied, upon the question of fact, that both the lower Courts have arrived at a just conclusion. We have no doubt whatever that the settlement in question was a mere device, for the purpose of defrauding Mr. Pogose's creditors. We believe that it has never been acted upon *bonâ fide*, and was never intended to be acted upon, except so far as was necessary for that purpose. We believe, moreover, that Mrs. Pogose herself was fully aware of the object of the deed, and that Mr. Manook, the father, was both party and privy to it. Under these circumstances, we consider that it would be contrary to equity and good conscience, and a very pernicious example, to allow such a device to prevail against the claims of creditors. We all know that in this country, more especially among certain classes of the community, a marriage is easily contracted, and almost as easily dissolved. We know also the vast variety of devices, which are constantly resorted to, for the purpose of defeating the claims of creditors. And if it were generally understood that the simple expedient of a marriage coupled with a settlement upon the wife of all her husband's property, subject only to a general trust for his maintenance, would have the effect of securing to an insolvent man the full enjoyment of his property, and of effectually setting his creditors at defiance, we fear that such marriages and settlements would be of very frequent occurrence."

The provisions of the two statutes of Elizabeth are substantially and concisely thrown into section 53 of the Transfer of Property Act, with this peculiarity, that like the statute 27 Elizabeth, the transfer is confined to immoveable property, and does not, as in the corresponding statute of 13 Elizabeth, extend to any other description of property. The words of that section are to this effect:—

"Every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or

delayed. Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid. Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration."

Note that in this section one does not meet with the words "good consideration" as in the statutes of Elizabeth, nor the words "valuable consideration" as in the decisions which have flowed from those statutes. "Consideration" is thus defined in the Contract Act: "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for his promise."[1] Moreover, having regard to the Contract Act consideration must be taken to mean "lawful consideration," or, in other words, consideration which is not prohibited by law.[2] Referring again to the Contract Act we read in section 25: "An agreement made without consideration is void, unless, (1) it is expressed in writing and registered for the time being in force for the registration of assurances, and is made on account of natural love and affection between parties standing in a near relation to each other, or (*b*) it is a promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor or something what the promisor was legally compellable to do, or (*c*) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditors might have enforced payment but for the law for the limitation of suits." It is obvious that what are known in English law as good or meritorious consideration, or merely moral consideration are under the express terms of this section of the Contract Act treated as no consideration at all.

It also appears from the language of section 53 of the Transfer of Property Act, that the party who seeks to set aside a transfer on the ground of prejudice must be in a position to prove the intent "to defraud, defeat or delay;" but where the effect of any transfer is to defeat or delay any creditor, the Court may presume fraudulent intent if the transfer was merely voluntary or in the nature of a mere gift, or if the consideration was found to be grossly inadequate.

Again, the words "in good faith" are not defined in the Transfer of Property Act; but these words should be understood, I presume, by the light of the explanation given in the English cases. I have already alluded to the explanation of LORD CAIRNS that the words "in good faith" mean "without notice of fraud

[1] Act IX of 1872, s. 2, cl. (*d*).

[2] See section 4 of the Transfer of Property Act: "The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872."

or fraudulent preferences."[1] In *Gill* v. *Cubitt*,[2] the words "*bonâ fide*" or in good faith are said to signify, as in the Indian Penal Code, "due care and caution."[3] In this connection, it will be well to refer to the definition of "notice" in the Transfer of Property Act. The definition will be found to include what is understood by English lawyers as actual notice as well as constructive notice or facts upon which the law will impute notice. This is the definition :—"A person is said to have "notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. or when information of the fact is given to, or obtained by his agent under the circumstances mentioned in the Indian Contract Act, s. 229."[4] Note, also, that good faith or bad faith is a question of fact depending on the circumstances of the individual case.[5]

The term, "creditors," in section 52 is used generally ; and having regard to the English cases on the subject, it may be taken to include both present and subsequent creditors or, in other words, not only persons who were creditors at the time of the gift or transfer, but also those who may happen to be creditors after the gift or transfer.

Although the section does not expressly speak of marriage as a valuable consideration, there can be no reasonable doubt that ante-nuptial settlements will under the section be deemed to be on the same footing as they are under the English law. It may be as well to state here that a Mussulman wife is in the position of a creditor to her husband in respect of her dower, and although as a rule a sum of money is settled upon a Mussulman wife as dower, yet where a Mussulman husband charges his estate for the benefit of his intended wife by a deed of dower, the wife must be regarded as occupying the position of transferee for consideration.[6]

Thus far with regard to those contrivances whereby creditors or *bonâ fide* purchasers are apt to be prejudiced. The transactions which are for that reason set aside are tainted either with the fraudulent intent of the transferor alone, or the collusive intent of the transferor and his grantee. The transactions which

[1] *Butcher* v. *Stead*, L. R. 7 House of Lords, 847.

[2] *Per* Lord Tenterden, 3 B. and C., 466.

[3] The Penal Code, s. 52.

[4] The Transfer of Property Act, section 3. Section 229 of the Contract Act is in these words: "Any notice given to, or information obtained by, the agent, provided it be given, or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to, or obtained by the principal."

[5] *Peacock* v. *Rhodes*, 2 Doug 633.

[6] *Hossain-ul-din Chowdhry* v. *Taj-ul-niss Khatoon*, W. R. 1864, 199. Ameer-ul-nissa's case, 6 M. I. A., 211.

next offer themselves for consideration are deemed to be vitious by reason of the actual or presumed fraud on the part of the transferee, and rendered voidable at the instance of the transferor. A variety of cases may well come under this head; but I shall select only that class of cases where fraud actually arises or is presumed to exist by reason of the relation in which the transferor and the transferee are found to stand to each other, whether such relation is of the well-known type of guardian and ward, parent and child, trustee and *cestui que trust*, or attorney and client in which persons are technically said to stand to each other in a fiduciary relation, or the mutual position of the grantor and grantee is such that the latter may be inferred to have had such influence upon the former as to have led to the grant. In one sense, however, transactions between persons standing to each other in any of the recognized fiduciary relations may be said to differ from those between persons who do not mutually occupy the same recognized position towards each other. Transactions between the former are regarded with greater jealousy than those between the latter. But the difference really consists in this that whereas in respect of transactions between persons standing to each other in the relation of guardian and ward or the like, the burden is cast upon the person who takes the benefit to sustain the transaction by evidence of *bonâ fides*, the burden of proving *mala fides* in a case, where a transaction is sought to be set aside on the ground of undue influence, in which the parties cannot be said to stand to each other in any of the recognized fiduciary relations, is upon the person who seeks to set aside his own grant or transfer. It is of the utmost importance that the free and voluntary contracts of parties should not be lightly interfered with nor restraints imposed upon the free disposition of property; but fraud is an exception to the general rule. Note the observation, in *Bridgeman* v. *Green*,[1] of LORD CHIEF JUSTICE WILMOT: "*Stet pro ratione voluntas*"[2] is the rule with us, and this court never did nor ever will annul donations merely as being improvident, and such as a wise man would not have made, or a man of very nice honour have accepted; nor will this court measure the degrees of understanding, and say that a weak man, provided he is out of the reach of a commission (that is not actually a lunatic) may not give as well as a wise man. But though this court disclaims any such jurisdiction, yet where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this court will look upon such a gift with a very jealous eye; and very strictly examine the conduct of the persons in whose favour it is made, and if it seems that any arts or stratagems or any undue means have been used, if it sees the least speck of imposition at the bottom, the donor is in such a situation with respect to the donee as may naturally give

[1] 2 Ves. Sen. 267.

[2] The will of the grantor should stand in the place of reason.

an undue influence over him, if there be the least scintilla of fraud, this court will and ought to interpose, and by the exercise of such a jurisdiction they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it."

The argument of SIR SAMUEL ROMILLY in *Huguenin* v. *Baseley*[1] is well worthy of consideration. That was a case in which the person in whose favour the grant had been made had undertaken the entire management of the affairs of the grantor. "The relief" argued the learned Counsel "stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. * * * Pothier says that by a latitude of interpretation, proceeding upon principles of public utility, that ordinance expressly concerning a testator or administrator, has been extended to the master of a school, the director of the conscience, the physician, and to other relations in which authority or influence must be supposed to exist." This argument was entirely adopted by LORD BROUGHAM in the celebrated case of *Hunter* v. *Atkins*.[2] These are his words: "For I take the rule to be this; there are certain relations known to the law, as attorney, guardian, trustee; if a person standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing everything to his knowledge which he himself knew. In short, the rule rightly considered is, that the person standing in such relation, must, before he can take a gift, or even enter into a transaction, place himself in exactly the same position as a stranger would have been in, so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or, without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law that is tolerable among civilised men, men who have the benefits of civility without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to shew that deception was practised, or that the attorney or the solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which

[1] 14 Ves. 285–286, (1807).

[2] 3 My and K. 135–141, (1834).

he stands to the other party, the proof lies upon him (whereas in the case of a stranger, it would lie on those who opposed him) to shew that he had placed himself in the position of a stranger, that he has cut off, as it were, the connection which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connection subsisted. The authorities mean nothing else than this, when they say, as in *Gibson* v. *Jeyes*,[1] that attorney and client, trustee and *cestui que trust* may deal, but that it must be at arm's length, the parties putting themselves in the situation of purchasers and vendors, and performing (as the court said, and I take leave to observe, not very felicitously or even very correctly) all the duties of those characters. The authorities mean no more, taking fairly and candidly towards the court, when they say, as in *Wright* v. *Proud*,[2] that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature; a dictum reduced in *Hatch* v. *Hatch*,[3] to this that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of shewing that everything was voluntary and fair, and with full warning and perfect knowledge; for in *Harris* v. *Tremenheere*,[4] the court only held that in such a case a suspicion attaches on the transaction, and calls for minute examination. This appears to me a much more intelligible and sound principle than that to which reference is made by the Master of the Rolls in his judgment, and which, in cases of this description, you will sometimes see alluded to—that a third person ought to be interposed. I say you will see it alluded to, for I can nowhere find it estsblished as a rule. Even in *Griffiths* v. *Robins*,[5] to which His Honour refers as the ground of the present decision, and which was a case heard before the same learned Judge, it is not so laid down. That was the case of an aged female, stricken with blindness, or nearly so and reduced by her age and her infirmities to a condition of entire dependence upon a niece and the husband of that niece to whom she made the gift; and the present Master of the Rolls, then Vice-Chancellor, held that the persons claiming the benefit of the gift were bound to show that it was the result of her own free will, and effected by the intervention of some indifferent person. But it is quite clear that he uses this as one obvious test or criterion of that for which we seek in all these cases, namely, the proof of a voluntary and deliberate act, and not as the only way in which the deed could be shewn to be of that description. No man, for instance, can doubt, that if letters had been produced, written by the old woman for a course of time, and without any interference at all: or conversations had been proved, in which her deliberate intention

[1] 6 Ves, 277. [2] 13 Ves., 138. [3] 9 Ves., 296.
[4] 15 Ves, 40. [5] 3 Mad., 191.

had been expressed, under no agency of influence or deception, the gift would have been good. To hold the contrary would be to say, that the law will not allow a person, dependent on the kindness of others for her comfortable existence, to show her gratitude towards them in the disposal of her property; in other words, to deprive such a person of a power over her property, whom it most of all imports to possess and to use that power of disposal. In no other case has anything of the kind ever been laid down; and I am of opinion that it is not laid down even in *Griffiths* v. *Robins*, unless you take the letter of the judgment against its plain meaning. In *Harris* v. *Tremenheere*,[1] where a person unacquainted with business, an invalid, and incapable of attending to his affairs, granted to an attorney, who was distantly related to him (son of his grandfather's cousin), and was his own steward, as he had been his father's, several leases for long terms, at nominal rents, it was strongly contended that this attorney and steward ought to prove that he had explained to the client what he was doing, and to have had a third person interposed; but the court said that there was no authority for holding that he could not take such leases as a pure gift from his employer. "If" said LORD ELDON, "I could find in the answer or evidence the slightest hint that the defendant laid before the testator any account of the value of the premises that was not perfectly accurate, that would induce me to set the leases aside, whatever the parties intended, upon the general ground that the principal never would be safe if the agent could take a gift from him upon a representation that was not most accurate and precise." LORD ELDON remarks, in another part of the same case, that where an attorney, agent, or steward takes leases without calling in a third person, not that the leases are void, but only that a suspicion attaches on the transaction, which justifies a thorough examination, and prevents the court from giving costs, should the result of the examination prove favourable, and the transaction stand. Nothing, it is manifest, can be more wide than this of a rule that a third person must, at all events, be interposed, and that this is the only criterion of a fair transaction between parties so related to one another. I have referred to the case of agent, attorney, or steward, as the strongest; as the one to which the jealousy of the court is at all times the most watchfully awake; and as the one in which alone I believe, except in *Griffiths* v. *Robins*, you will find the interposition of third parties mentioned, to the effect of holding the want of such interposition a sufficient ground for setting aside the transaction. Where the relation in which the parties stand to each other is of a sort less known and definite, the jealousy is diminished. A confidential adviser, one who has been generally consulted in the management of the person's affairs, though he may also have been employed specially in his business,

[1] 15 Ves, 40

does not lie under the same suspicion with an attorney or a steward, or any one who has a general management. In *Pratt* v. *Barker*,[1] the object of bounty was one who had been employed for many years as the surgeon and apothecary of the donor, had received his dividends for him, and had oftentimes been consulted by him respecting the management of his property. Through him the instructions to frame the deed were conveyed to the donor's solicitor, who so far deviated from those instructions as to leave a blank for the donee's name till he saw his client; and because it was proved that the donor understood the nature of the gift, and had the deed read over and explained to him, the court refused—and without hesitation or even hearing the defendant—to set it aside. In the famous case of *Huguenin* v. *Baseley*,[2] remarkable among other things for the display of those transcendent talents, and that pure taste, by which, among many other accomplishments, SIR SAMUEL ROMILLY elevated and adorned the bar, there was a great and general influence exercised of a peculiar kind. It led to the giving up of the whole direction of the party's concerns into the defendant's hands, even to the delivering over of her title-deeds by her solicitor. It ended in a conveyance of an estate without consideration; and yet the court held that the proper inquiry was, were her bounties the pure, voluntary, well understood acts of her mind? "Did she execute the deeds not only voluntarily, but with all the knowledge of their effect, nature and consequences, which the defendants *Baseley* and the attorney were bound by their duty to communicate to her? The rule, I think, cannot be laid down much more precisely than I have stated it; that where the known and defined relation of attorney and client, guardian and ward, trustee and *cestui que trust* exists, the conduct of the party benefited, must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favour may have arisen out of the connection; and that where the only relation between the parties is, that of friendly habits or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The limits of natural and often unavoidable kindness with its effects, and of undue influence exercised or unfair advantage taken, cannot be more rigorously defined. Nor is it perhaps, advisable that any strict rule should be laid down—any precise line drawn. If it were stated that certain acts should be the only tests of undue influence, or that certain things should be required in order to rebut the presumption of it, such as the calling in a third person, how easy would it be for cunning men to avoid the one, or protect themselves by means of the other, and so place

[1] 1 Sim. 1, 4 Russ., 507.

[2] 14 Ves., 273.

their misdeeds beyond the denunciations of the law, and secure the fruits of them out of its reach! If any one should say that a rule is thus recognised, which from its vagueness cannot be obeyed because it cannot well be discerned, the answer is at hand. All men have the interpreter of it within their own breasts; they know the extent of their influence, and are conscious whether or not they have taken advantage of it in a way which they would feel indignant that others similarly circumstanced should do with regard to themselves. The circumstances of each case, therefore, are to be carefully examined and weighed, the general rule being of a kind necessarily so little capable of exact definition; and on the result of the inquiry we are to say, has, or has not, an undue influence been exerted,—an undue advantage taken?"

Note also the remarks of LORD JUSTICE TURNER in *Rhodes* v. *Bate*:[1]—"I take it to be a well-established principle of this court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence. And, as to the nature of the benefit, the injury to the party by whom the benefit is conferred cannot depend upon its nature. This general principle, however, must, as it seems to me, admit of some limitation. It cannot, I think, reasonably be said, that a mere trifling gift to a person standing in a confidential relation, or a mere trifling liability incurred in favour of such a person ought to stand in the same position as a gift of a man's whole property, or a liability involving it, would stand in. To carry the principle to this extent would, I think, interfere too much with the rights of property and disposition, and would be repugnant to the feelings and practice of mankind. In these cases, therefore, of merely trifling benefits, I think this court would not interfere to set them aside upon the mere fact of the proof of a confidential relation and the absence of proof of competent and independent advice. In such cases, the court, before it would undo the benefit conferred, would, I think, require some further proof—proof not merely of influence derived from the relation, but of *mala fides*, or of undue or unfair exercise of the influence."

[1] L. R. 1 Ch. Ap., 257-258.

In *Dent* v. *Bennet*[1] the defendant was a surgeon and apothecary who had attended the testator, Dent, in what was represented to have been a dangerous attack and illness. At the date of the agreement the testator was in his eighty-sixth year. So that, according to the usual course of nature, what might remain to him of life must have been supposed to have been confined to a very short time from that period, yet by the agreement regarding it as a contract for value, the testator agreed to pay to the defendant 25,000£ for the medical and surgical treatment of the defendant during the remainder of the testator's life. LORD COTTENHAM therefore observed :—"What is the case independently of disputed facts ? A medical attendant obtains from his patient, eighty-five years of age an agreement to pay him 25,000£ for services completed two years before, the regular charge for which had been previously paid ; and this privately without the intervention of any third person and carefully concealed until after the death of the patient. Of such it may at least be said in the language of LORD ELDON[2] that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous. It was argued upon the authority of the Civil law and of some reported cases that medical attendants were, upon questions of this kind within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. Undoubtedly they are ; but I will not narrow the rule or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this court by any enumeration of the description of persons against whom it ought to be most freely exercised. "The relief," —as SIR S. ROMILLY says in his celebrated reply in *Huguenin* v. *Baseley* (from hearing which I received so much pleasure that the recollection of it has not been diminished by the lapse of more than 30 years)—"the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another," and when I find an agreement, so extraordinary in its provisions, secretly obtained by a medical attendant from his patient of a very advanced age and carefully concealed from his professional advisers and all other persons, and have it proved that the habits, views, and intentions of the testator were wholly inconsistent with these provisions I cannot but come to the conclusion that the medical attendant did obtain it by some dominion exercised over his patient. How it was effected, whether by direct fraud, or by what other way, the defendant has by his secrecy of the transaction prevented my having any direct testimony. By that he cannot profit."

In India, there is, as was said in *Tarakanto Banerji* v. *Puddomoney Devi*,[3] much danger of secret collusion. The acts, on the one hand, of abandoned and imbecile heirs, and *purda-nashin* females,[4] on the other, no less than *benami*

[1] 4 My and Cr. 27, (1839).

[2] *Gibson* v. *Jeyes*, 6 Ves , 266.

[3] 5 W. R. (P. C.), 63.

[4] Narayan Singh *v.* Gungadhar Prasad, 9 W. R , 29.

and other secret transactions of indebted persons, are found to furnish reasons for grave suspicion. There is an old English case; instances of which are by no means infrequent in Bengal. It is *Nedham* v. *Beaumont*.[1] That was the case of a man who was of small understanding, and not able to govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends openly conveyed his lands to them on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same, and afterwards he being seduced by deceitful and covinous persons for a small sum of money bargained and sold his land, being of great value.

The English law on the subject of fiduciary relation was summed up and applied in *Pushong* v. *Munia Halwani*.[2] There, the defendant stated that the plaintiff on the death of her brother applied to the defendant, who was a mookhtear to assist her in obtaining a certificate under Act XXVII of 1860 and in getting possession of the property to which other persons laid claim on the strength of a will which it was alleged the brother had made; and by way of remuneration for the defendant's services, the plaintiff executed an agreement by which she bound herself to give him one-fourth of all the property which she might recover, if he, as her mookhtear, enabled her to get the certificate. After this agreement was entered into the plaintiff, who was a very poor woman, being unable to defray all the expenses, executed another agreement in supersession of the previous one, by which she bound herself to give him one-half of the property, which she might recover, if he carried on such suit, and did such other acts as might be found necessary to that end, and if he advanced the requisite funds, and it was further agreed, that he was to have all the costs which might be realized. The defendant admitted having, in satisfaction of his agreement, taken possession of the property, and having realized the rent of the house, after having obtained for the plaintiff the certificate and possession of the estate. PHEAR, J. thus explained the law on the subject: "Now it is always held in Courts of equity that a contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust, is liable to be called in question by the vendor, and to be set aside at his instance if it be found that the other party made an unfair use of his advantages, so also when the seller labours under such disabilities, or is so situated as to be peculiarly liable to be imposed upon; and bargains with widows and single *purda*-women fall within this class. But especially in a case, where any person, acting as an attorney or as a skilled legal adviser, enters into a contract of purchase with his clients in respect of the subject of litigation or advice, is the contract liable to be questioned at any time, and

[1] Coke's Rep. Part III, 83*a*.

[2] 1 B. L. R., 96.

when it is questioned, every presumption is made against its being just. Undue influence is presumed to have existed until the contrary is proved; and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair, adequate and reasonable. Upon the facts of this case, although in strictness, perhaps the defendant was not actually the attorney or adviser of the plaintiff at the very moment when he made the bargain with her, still it is clear that he was so situated relative to her as to possess all the influence and advantages which belong to that relative's life, and which are the foundation of the plaintiff's equity."

In connection with the topic of fraudulent transfer, it will be appropriate to consider the doctrine of *lis pendens*. That doctrine relates to the transfer of property which forms the subject of a pending suit. The peculiarity of the doctrine consists in this that where there is a close and uninterrupted prosecution of a suit, the transfer of any property in suit by any of the litigant parties will not bind the other, even though the transferee happened to be a purchaser for valuable consideration without notice of the suit.

In *Preston* v. *Tubbin*[1] it was said that before a man could be affected with a *lis pendens* there must be a close and continued prosecution.

In *Barry* v. *Gibbons*,[2] a decree was made in a creditor's suit for the administration of the personal estate of the testator; but no receiver was appointed nor any injunction granted to prevent the executrix from dealing with the assets. More than two years after the decree and nearly three years after the death of the testator, the executrix opened an account and pledged a picture with a Bank. The question was whether the Bank was entitled to the price of the picture, or was it affected with *lis pendens*. It was apparent from the facts that there was no close and continued prosecution, and LORD JUSTICE JAMES said that the doctrine of *lis pendens* did not apply.

In *Bellamy* v. *Sabine*,[3] the observations of LORD CRANWORTH and LORD JUSTICE TURNER were directed to the question whether the doctrine of notice had any bearing on the principle of *lis pendens*. LORD CRANWORTH there said:— "It is scarcely correct to speak of *lis pendens* as affecting the purchaser through the doctrine of notice. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. When a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice of the pend-

[1] 1 Vern. 256, (1684). [2] L. R. 8 Ch. Ap., 750, (1873). [3] 1 De Gex. and Jones, 566, (1857).

ing proceedings. If this were not so, there would be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence. *Lis pendens* is implied notice to all the world. I confess I think that is not a perfectly correct mode of stating the doctrine, what ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent."

"The true interpretation of the rule," observes PLUMER, M. R.,[1] "is that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable, if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant cannot vary the situation or affect the right of the plaintiff." Note, also, the maxim *pendente lite nihil innovetur*, *i. e.*, no rights can be altered or created in respect of property which is the subject of a suit.

Under the New York Code to take a conveyance of land or of any interest therein from a person not in possession while the land is the subject of controversy by suit and with knowledge of the suit is declared to be a misdemeanour.

The principle of *lis pendens* has been always recognized in British India. In *Kasim Shaw* v. *Unnodapershad Chatterji*, "*lis pendens*" was spoken of "as an equitable principle of universal application."[2]

In *Umamoyi Barmonia* v. *Tarinipershad Ghose*,[3] it was said that the defendant having purchased property, which was actually in litigation, during the pendency of the suit, the plaintiff was not bound to make him a party to the suit, and inasmuch as the title acquired by the defendant was subservient or subject to the rights of the parties in litigation, he was bound by the decree in the suit.

In *Balaji Ganesh* v. *Khushalji*,[4] WESTROPP, C. J. observed: "To the English statute, 2 Vict. c. 11, which provides that a *lis pendens* unless duly registered shall not affect a purchaser without express notice, there is not any analogous enactment in this country. In England, before that statute, if there had been a close and uninterrupted prosecution of the suit, a purchaser *pendente lite*,

[1] *Metcalfe* v. *Pulvertoft*, 2 Ves. and B., 200.
[2] 1 Hyde, 160.
[3] 7 W R, 226.
[4] 11 Bom H C R, 24.

although for a valuable consideration and without notice was bound by the decree."[1]

The law laid down in the Transfer of Property Act is substantially on the lines of the foregoing authorities. Section 52 of the Act is in these words :— "During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

Mark that a mere partition suit can hardly come under the designation of a contentious suit.[2]

It will not be out of order to consider here the subject of "actionable claims", which has, for the first time, obtained a distinct place in the British Indian statutes. The tendency of the Legislature is manifestly to discourage the transfer of actionable claims, as if such a transfer was of a quasi-fraudulent character. "Where an actionable claim is sold, he against whom it is made, is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it," is the law of the Transfer of Property Act.[3] Suppose, for instance, there is due to A a sum of Rs. 500 on a bond from B; A assigns the bond to C for Rs. 100. B would be wholly discharged by paying to C the sum of Rs. 100 with incidental expenses, if any, and interest on the price. The object of the Legislature in laying down this rule seems to be to discourage anything like what is known in English law as champerty and maintenance, or to prevent speculation on suits, on the one hand, and unconscionable bargains on the other.

The statutes which were repeatedly passed in the reign of Edward I and Edward III against champerty and maintenance arose from the embarrassments which attended the administration of justice in those turbulent times from dangerous influence and oppression of men in power. The bearing up or upholding of quarrels or sides to the disturbance or hindrance of common justice was signified by the general term maintenance; and when this was done with a view of having a part of the thing in plea or suit, it was then named champerty *cambi partia* or *campi partitio*, that is, a sharing of the

[1] See *Indurjeet Koer* v. *Pootee Begum*, 19 W. R., 197.

[2] See Kailas Chandra Ghose's case, 8 B. L. R., 474.

[3] Sect. 135.

spoil.[1] In *Fischer* v. *Kamala Naicker*,[2] it was said that "champerty or maintenance must be something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary." In *Ramcumar Coondoo* v. *Chanderkant Mukerji*[3] it was held that "a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy; but an agreement of such a kind ought to be fairly watched, and when extortionate, unconscionable or made for improper objects, ought to be held invalid."

In the English law, the rule is that the *bonâ fide* purchaser of an incumbrance, for less than is due upon it is entitled to be paid all that is due on the purchased security. As the transferor might have assigned the incumbrance *gratis*, it is but just that the measure of the allowance should be what was due and not what was paid, and the assignee taking the hazard should also have the benefit of the bargain. There is, however, an exception made where the assignee stands in a fiduciary relation to the debtor, and then the measure of the allowance is not what was due; but what was paid.[4]

Not having Justinian's Code before me, I must content myself with this short extract from Professor Hunter's valuable book on the topic of Actionable Claims in Roman law. "Generally there was no impediment to a transfer, except in the case where the transfer was made in order to vex a debtor with a more powerful creditor; but Anastasius introduced a more effective protection to debtors. The evil that he redressed was the sale of debts for less than their amount to persons that made a trade of harassing debtors. He enacted that no transferee of a debt should recover more from the debtor than he had paid to the transferor, with lawful interest. The exception was when co-heirs and legatees divided debts among them, assigning to them a value in the division below their real amount. Anastasius did not interfere with transfers made by way of gift."[5]

An actionable claim is thus explained in the Transfer of Property Act in section 130:—"A claim which the Civil Courts recognize as affording grounds of relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary." As the chapter on the transfer of actionable claims in the British-Indian Act is as nearly as possible a faithful copy of the provisions of Chapter VIII of Code Napoléon, I think, I ought to lay before you the corresponding sections of the French Code. In Code Napoléon, the chapter is entitled, "on the transfer of credits and other incorporeal rights or claims." Article 1689, or the first section under the chapter, runs thus: "In the

[1] Crabb's Hist of English Law, 181.

[2] 8 M. I. A, 170.

[3] I. L. R 2 Calc., 233.

[4] 2 Fisher's Mortgage, Second Edition, 870.

[5] Hunter's Roman Law, 448.

transfer of a credit, of a claim or right (*droit*) or of an action against a third person, delivery is effected between the transferor and the transferee by the assignment of the title." The next article speaks of "the notification to the debtor," (la signification du transport faite au debiteur). Article 1691 says that "if before the transferor (*le cédant*) or the transferee (*le cessionaire*) have signified the transfer to the debtor, the latter should have paid the transferor, he shall be properly discharged." Then, (Article 1695), "when he (the transferor) has promised to guarantee the solvency of the debtor, the promise in the absence of any express stipulation, will extend only to the actual solvency and not to a future time, and even then up to the amount (Article 1694) of the price which he has gained for the credit." Article 1699 is of great importance and is in these words: "He against whom has been assigned a disputed claim (*un droit litigieux*) will be absolved by paying to the assignee the real price for the transfer with the charges and lawful expenses and with interest to be computed from the day when the assignee paid the price." Then follows the explanation of "*un droit litigieux*" which is to this effect: "a thing is deemed disputed (*litigieux*) as soon as there is a suit (*procés*) and contest on the ground of right (*droit*)." Then follow three exceptions to this rule, (*a*) when the assignment has been made to a co-heir or co-proprietor of the claim (*droit*), (*b*) when the assignment is made to a creditor in payment of what is due to him, and (*c*) when the assignment is made to the possessor of the estate (*l' héritage*) subject to the disputed claim.

It will be observed that in the Transfer of Property Act, a claim is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary. In this an actionable claim differs from the "*droit litigieux*" of the French law. Again, the corresponding section to Article 1699 is Sec. 135 of our Act; but to the latter is appended this additional exception:— "Nothing in the former part of this section applies, where the judgment of a competent court has been delivered affirming the claim or where the claim has been made clear by evidence and is ready for judgment."[1]

The point, however, which seems to present some difficulty is, what are the kinds of property, or proprietary rights, which actionable claims are intended to embrace? From the terms of section 130, it appears that the word "claim" is used in the widest sense, and reading section 131 along with it, it becomes all the more clear that an actionable claim is not confined to a mere debt or moveable property. Section 139 expressly excepts "negotiable instruments" from the law of actionable claims.

Now, it should be observed that the term, chose in action, in English law strictly covers debts of all descriptions whether on bonds or promissory notes. Chose in action in a general sense is probably the right of going

[1] See Grishchander *v.* Kashishari Debi, I L. R. 13 Cal., 145.

to law in respect of some property.[1] Chose in action is used with reference to "property in action" as distinguished from "property in possession;" for instance, "Where a man has not the enjoyment, actual or constructive, of the thing in question, but merely a right to recover it by a suit or action at law, the thing so recoverable is called a thing (or chose) in action."[2] Probably the term "actionable claim," in the Transfer of Property Act, requires a fuller explanation.

In *Muddunmohan Dutt* v. *Futte-ul-nissa*,[3] MITTER, J. seems to be of opinion that Section 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. That learned Judge, however, thought it unnecessary for the purposes of the case that was before him "to define exactly the classes of cases coming within the purview of section 130, all that we decide is, that a transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession." That was a suit to recover possession of an 8-anna share of a quantity of land. The full 16 annas of the property was originally in the joint possession of four brothers, two of whom sold the whole property to a certain person, who took possession under the sale. The two other brothers who were no parties to the sale, and were thus out of possession, sold their 8-anna share of the property to the plaintiff. It was contended on behalf of the defendant, the vendee of the 16-anna share, that the plaintiff's vendors being out of possession when they effected the sale, the plaintiff had purchased an actionable claim as defined by Section 130 of the Transfer of Property Act, and was entitled to no more than the amount of consideration money actually paid by him and the incidental expenses of the sale. The following observation of MITTER, J. is well worthy of consideration:—"The Transfer of Property Act is divided into several chapters. Chapter I deals with preliminary matters. Chapter II deals with general rules relating to the transfer of property. Then from Chapters III to Chapter VIII, the Act deals with rules of law relating to different kinds of transfer of property. Chapter III treats of sales of immoveable property. Chapter IV deals with mortgages of immoveable property and charges. Chapter V with leases of immoveable property. Chapter VI deals with the subject of exchange. Chapter VII deals with the subject of gifts, and then comes Chapter VIII, which deals with transfers of actionable claims. It is clear from the division of these chapters, that it is made with reference to the different classes of transfer, and therefore if a particular transfer comes under one chapter, it is necessarily excluded from the other chapters. That being so, it is important to consider whether, under the circumstances of this case, the transaction comes

[1] Stephen's Com. Vol. 2, p 45.

[2] Stephen's Com. Vol. 2, p. 11.

[3] I. L. R. 13 Cal., 300.

within the definition of a sale of immoveable property; if it does, it appears to us that it would not come under the purview of any of the following chapters, including Chapter VIII."

The tendency of the decision, if I may venture to say so, seems to be that rights relating to contracts, and actions arising out of their breach, whether in respect of moveable or immoveable property, alone come under the designation of "actionable claims;" but claims for the recovery of possession of immoveable property held by another, whether wrongfully or upon an adverse title, do not come within the scope of an actionable claim.

But, note Rudraperkash Misser's case. There, the father of a Mitákshará family made a gift of the entire ancestral estate to his minor son with the exception of 150 bighas of land which he reserved for himself by a clause in the deed in these terms, "Bighas 150 by measurement in mouzah P. or any other mouzah shall remain in my possession for *zerat* (cultivation), the measurement and demarcation shall be made as soon as possible, and the said land should remain in my possession without payment of any rent for cultivation." Afterwards the Collector took charge of the estate, the subject-matter of the gift, on behalf of the minor. The 150 bighas, however, were neither marked out nor appropriated by the grantor under the clause in the deed of gift. One K. M. G. then obtained a money decree against the father, and in execution of that decree, purchased "the judgment-debtor's right to get by division or separation 150 bighas of land by measurement in mouzah P. or in any other mouzah for the purpose of cultivation." WILSON, J. there observed:—"It is perfectly clear from the terms of the Transfer of Property Act that the interest in question is saleable under s. 6 of that Act, "property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force." The framers of that section clearly considered that property includes an actionable claim, because cl. (c.) of that section says: "A mere right to sue for compensation for a fraud or for harm illegally caused, cannot be transferred." Besides this, there is a whole chapter in the Act, Chapter VIII, dealing with the subject of such claims, thereby placing it beyond doubt that a claim such as this is a transferable claim, and therefore capable of being attached and sold in execution."[1]

Section 135 leaves untouched the case of a gift of an actionable claim. The gratuitous donee of an actionable claim is left free, I presume, to realize the whole amount of the debt, just in the same way as a gratuitous donee of a promissory note.[2]

[1] I L. R 14 Cal, 241. (*Inserted afterwards*)

[2] See the Negotiable Instruments Act.

LECTURE XI.

ON THE MODES OF TRANSFER.

I SALE, II EXCHANGE, III GIFT.

Ownership, a bundle of rights—Rights of ownership, how distributed—Who is the owner?—Transfer, meaning of—Principle of the law of transfer—Bentham's enunciation—Voluntary Transfer and Involuntary Transfer—Voluntary Transfer *inter vivos*—Absolute Transfer and Partial Transfer—Position of sale in the history of the law of transfer—Transfer forbidden in ancient law—Vyása's opinion—Sale through the form of gift—Nárada's definition of sale—Brahmanic law of sale—Possession, how necessary to complete sale—Latent defects or Secret blemishes, effect of—Written instruments, their value—Roman law on sale—The rights and duties of seller and buyer—English law—Contract of sale—Contract *in fieri*, Contract completed, Conveyance—The rights or relation of parties during contract and before conveyance—*Cass* v. *Rudel*—*Paine* v. *Meller*—*Seton* v. *Slade*—*Wall* v. *Bright*—*Lysaght* v. *Edwards*—*Rayner* v. *Preston*—*Castellain* v. *Preston*—The mutual duties of the contracting parties—The parties in the situation of trustee and *cestui que trust*—*Phillips* v. *Silvester*—What defects must a seller disclose—LORD ST. LEONARDS's observation—*Shirley* v. *Stratton*—*Petre* v. *Petre*—*Hill* v. *Gray*—*Lucas* v. *James*—"What falsehoods the seller may utter"—LORD ST. LEONARDS's remarks—*Davies* v. *London and Provincial Marine Insurance Co.*—Latent and Patent defects—The doctrine of *caveat emptor*—*Clare* v. *Lamb*—Purchaser not bound to disclose latent advantage—*Fox* v. *Mackreth*—Discovery of undervalue in sale, effect of—*Okill* v. *Whittaker*—The vendor's lien for purchase money—*Crockford* v. *Alexander*—The purchaser's lien—*Rose* v. *Watson*—*Maddison* v. *Chapman*—*Neeson* v. *Clarkson*—Contract of sale in relation to third parties—The doctrine of notice—Notice, explanation of—*Hiern* v. *Mill*—*Whitbread* v. *Jordan*—*Jones* v. *Smith*—*Peto* v. *Hammond*—*Gibson* v. *Inigo*—*Wilson* v. *Hart*—Actual notice and Constructive notice—*Benham* v. *Keane*—PAGE WOOD, V. C., his observation on "Notice." Law of Sale in British India—Chooneelal Nagindur's case—Waman Ramchandra's case—The Specific Relief Act, s. 13—Nemai Charn Dhabal's case—The Specific Relief Act, s. 27—Seedee Nazir Ali Khan's case—Sammakkamdar's case—Rennie's case—The Transfer of Property Act, s. 41, s. 38—Ramcoomar Koondu's case—Neelkristo Deb's case—The Hindu widow's right of maintenance, its effect in transfer—The Transfer of Property Act, s. 40—*Ramratan Sen* v. *Wise*—Dayaljairaj's case—Publicity, an essential element in transfer—Mitákshará—Registration—The Transfer of Property Act—Definition of sale—Section 54—Good title—Devsi Ghela's case—*Gajapati* v. *Alagia*—Latent and Patent defects—Vendor's and purchaser's lien—Covenant by trustee—*Worley* v. *Frampton*—The law of Exchange—The law of Gifts—Mussalman law—Brahmanic law—Cases illustrative.

Ownership may be said to consist of a bundle of rights. In modern times, such rights are not unfrequently met with in a dispersed state. It is when they are thus found to be distributed among different persons that the difficulty arises of determining with any degree of precision as to who is the real owner. Take, for instance, the case of a house. When all the rights in respect of it

are found to exist in one and the same individual, there is no difficulty of ascertaining who is the real owner. But, it may be, as generally happens, that the owner has parted with some interest in the house or some use to which it can be put to, in favour of some other person. One person may have had the rights of a mortgagee conferred upon him, and another the rights of a lessee in respect of the house. Nevertheless, in popular belief,[1] the original owner still remains the owner of the house; for he it is with whom rests the ultimate power of disposing of the thing itself. To ascertain the various modes in which an owner may part with, or transfer his rights in favour of another, or, in other words, how an owner may, so to say, detach either the whole or any portion of his rights from himself and invest others with those rights, will form the next topic of investigation.

The principle of the law of transfer is well enunciated by Bentham.[2]—"It may happen that possessing a thing by a lawful title, we wish to dispossess ourselves of it, and to abandon its enjoyment to another. All the reasons which plead in favour of the old proprietor change sides with the transfer, and then plead in favour of the new one. Besides, the former proprietor must have had some motive for abandoning his property. Motive is pleasure or its equivalent; pleasure of friendship or of benevolence, if the thing was given for nothing; pleasure of acquisition, if it was a means of exchange, pleasure of security, if it was given to ward off some evil; pleasure of reputation, if the object was to acquire the esteem of others. It seems, then, that the transfer must increase the enjoyment of the parties interested in it. The acquirer stands in the place of the conferrer as to the old advantages, and the conferrer acquires a new advantage. We may then lay it down as a general maxim, that *every alienation imports advantage.* A good of some sort is always the result of it. When the question is of an exchange, there are then two alienations, of which each has its separate advantages. The advantage for each of the contracting parties is, the difference to him between the value of the thing he gives, and that of the thing he acquires. In every transaction of this sort there are two new masses of enjoyment. In this the good of commerce consists. In all the arts, there are many things which cannot be produced except by the concourse of a great number of workmen. In all these cases the labour of an individual would have no value, either for himself or for others, if it could not be exchanged."

Transfer, as has already been observed, may take place in various ways. The owner may either willingly part with his rights or he may have to do so under compulsion. The former mode of transfer has been appropriately described as voluntary transfer, and the latter as involuntary. I may mention here that the expression, voluntary transfer, is sometimes used in the narrow

[1] Ortolan's observation, *ante*, page 96. [2] Bentham's Theory of Legislation, 168.

sense of a transfer without valuable consideration. As instances of involuntary transfer, or such transfer as is effected either against or independently of the will of the owner, may be given, the case of a transfer in execution of a decree, and that of a transfer which arises on the death of an owner. Moreover, voluntary transfer, in its extended sense, may be made either to take effect in the lifetime of the owner or after his death. In the former case, it is called voluntary transfer *inter vivos*. And it is only with this mode of transfer in so far as it affects immoveable property that I am at present concerned. It may be as well to note, here, that a legacy or devise is an instance of voluntary transfer to take effect after death.

Voluntary transfer *inter vivos* may conveniently be divided into two classes. It may either take the form of Absolute Transfer or that of Partial Transfer. Absolute Transfer embraces those cases where the owner parts with all his rights, or all such rights as may happen to remain in him in favour of another, and thus ceases altogether to be an owner in any sense of the term, as in sale, exchange, or gift. Partial Transfer, on the other hand, takes place in those cases where the owner parts only with some, or a portion of his rights in favour of another; but, notwithstanding, continues to be the owner in the conception of the law, as in lease, charge, or mortgage.

Now, of the three modes of absolute transfer, sale occupies a prominent place in modern law; but in the history of the law of transfer, sale appears as the latest form. In the religious stage of society, of which the traces are so abundant in the Brahmanic system of jurisprudence, sale was unknown, and, indeed, impossible. You have seen how the belief in the necessity for subsistence in after-life or in the future state rendered the preservation of family property absolutely indispensable. The intense concern for spiritual benefit made people anxious to secure the means of support for their descendants who alone would be capable of conferring that benefit. "They who are born and they who are yet unbegotten and they who are still in the womb," in the emphatic language of Vyása, "require the means of support, no gift or sale therefore should be made."[1] But although sale was impossible in ancient times, gift was not considered to be so. The best way that a sonless person could expect to secure the prospect of a spiritual benefit would be either by adoption or gift. However, adoption like sale would be impossible in the early stage of a religious society. If it was pollution to touch other people's property, it would be much more abominable to come into contact with other people's person, and the safer course under the circumstances would probably be for a sonless man to leave his property with one that could be trusted to perform those mundane ceremonies which were conceived to be so necessary for the benefit of the *manes*. But the difficulty would still present itself as to how to reconcile such a transfer with the primitive

[1] Mitakshárá, Part 2, c. 1, 1, 27.

notion of exclusiveness. In order to obviate the difficulty ancient wisdom proceeded to enact that a gift to be valid should be accompanied with the delivery of gold and water.[1] The pious purposes for which a gift was allowed to be made consisted of, in the words of Vijnáneshwara, "the obsequies of the father and the like."[2]

With the growth, or rather the secularization, of society, sale found its way into Brahmanic transactions, and people became gradually familiar with that form of transfer under the guise, or through the fiction, of gift. "In regard to immoveable estate," one reads in the Mitákshará, "sale is not allowed, and since donation is praised, if a sale must be made, it should be conducted, for the transfer of immoveable property, in the form of a gift, delivering with it gold and water."[3] According to Nárada, sale is the exchange of a thing for a price, and is concluded upon payment of the price. In the event of any loss or gain accruing to the article after sale, the loss or gain is that of the seller or the buyer according as the one or the other has refused to give or take delivery. If a commodity which though sold is not delivered, in the words of the text, on demand, be injured by an act of God or the king, (राजदैवोपघातेन) the loss shall fall on the seller, whereas should such loss arise upon the failure or neglect of the purchaser to take delivery, the purchaser must bear the loss. On the other hand, he who having received the price (पन्यं) of a thing does not deliver it to the buyer shall be caused to deliver it together with all the accessories (सोदयं).[4] Moreover, it is said that a sale, gift or pledge made without ownership should be rescinded,[5] and the true owner may pursue the property into any hands.[6] With respect to the consequences of defects or blemishes in the title or in the object of transfer, Yájnavalkya observes: "When one sells a thing previously sold to another, or sells a thing with blemishes (दुष्टं) as one without blemish, the fine is twice the value of the article."[7]

It appears that actual delivery or bodily possession, though sometimes desirable, was never absolutely insisted upon by the later Brahmanic lawyers to the completion of a sale. "In the case of land," in the words of the Mitákshará, "as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession: otherwise the gift, sale or other transfer is not complete;" but mark what follows, "a title, therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it or with such corporeal acceptance; but such is the case only, where of the two the priority is undistinguishable; when, however,

[1] Mitákshará, c. 1, 2, 32.
[2] Mitákshará, c. 1, 1, 29.
[3] Mitákshará, c. 1, 2, 32.
[4] Yájnavalkya, c. 2, v 254, v 255, v. 256.
[5] Kátyáyana in the Vyávahára Mayukha.
[6] खंडमेतान्य विक्रीतं Yajnavalkya, c. 2, v. 168.
[7] C. 2, v. 257.

it is ascertained which is first in point of date, and which posterior, then the simple prior title affords the stronger evidence."[1]

Written instruments are particularly recommended and approved in matters of sale and other transfers, because, in the metaphorical language of the author of the *Smriti Sangraha*,[2] they will endure as long as the son and the moon.[3] "When the terms of a contract are written down, the obligor should give his name with his own hand; if ignorant, his assent must be written: then at the end, the writer of the document or the scribe should write at the request of both parties, "this is written by me."[4] A deed written by the executant himself requires two attestations.[5]

In Roman law, the contract of sale is formed as soon as the price is agreed upon, although the price may not have been paid. The principal objects of the obligation of sale are said to be a thing on the one hand, and the price on the other. In the language of Pomponius, there can be so sale or purchase unless the thing exists (neque emptio nec venditio sine re quæ veneat potest intelligi);[6] to which are added in the Institutes the words, "Nor can there be any sale without the price" (nulla emptio sine pretio esse potest).[7] The price should consist of money (pretium in numerata pecunia consistere debet).[8]

The observations of the Roman lawyers on the subject of the mutual duties of the seller and the buyer are worthy of note. The seller was bound to deliver the thing sold to the buyer;[9] but not until he got the whole price. If the seller failed to give delivery, he was responsible even for any accidental loss; but on the other hand, if the buyer made delay or failed to take delivery at the proper time, such loss would fall on him, and he would be bound to pay the price all the same. Before delivery in the usual course the seller is bound to take such care of the thing as a prudent householder is expected to do. The buyer would be entitled to call for damage by reason of the gross laches of the seller.

"Another effect of the obligation of the seller and the buyer," in the words of M. Ortolan, "is that as soon as the sale is perfect, even before the delivery has taken place, the risk, as well as the advantages of the thing (periculum et commodum) pass to the buyer: (post perfectam venditionem omne commodum quod rei venditæ contingit ad emptorem pertinet.)"[10]

As soon as the sale is contracted, in the language of the Institutes, that is, in the case of a sale made without writing, when the parties have agreed

[1] Mitákshará, part 1, c. iii, 6, 4 and 5.
[2] Vyávahára Mayukha.
[3] चन्द्रार्क कालिकं.
[4] Yájnavalkya, c. 2, v. 88.
[5] Mitákshará.
[6] D. 18, 1.
[7] Justinian's Institutes, Lib. iii, Tit. 23, 1.
[8] *Ibid* Tit, 23, 2.
[9] D. 19, 1.
[10] Ortolan, Tome 3, p 280

on the price, all risk attaching to the thing sold falls upon the purchaser, although the thing has not yet been delivered to him. Therefore, if the slave dies or receives an injury in any part of his body, or a whole or a portion of the house is burnt, or a whole or a portion of the land is carried away by the force of a flood, or is diminished or deteriorated by an inundation, or by a tempest making havoc with the trees, the loss falls on the purchaser, and although he does not receive the thing, he is obliged to pay the price, for the seller does not suffer for anything which happens without any design or fault of his. On the other hand if after the sale, the land is increased by alluvion, it is the purchaser who receives the advantage, for he who bears the risk of harm ought to receive the benefit of all that is advantageous (nam et commodum ejus esse debet cujus periculum est.[1] These provisions are really exceptions to the maxim "res perit domino" or, in other words, it is the owner that suffers the loss; for, in the language of Justinian, the person who has not delivered the thing is still its owner.[2]

Moreover, it was the duty of the seller to give at least undisturbed possession, and in the event of an eviction under the law by a third party, unless there was a stipulation to the contrary, the seller was liable in damages. However, in any case, the buyer was entitled to undisturbed possession against any act of the seller or his privies.[3]

Then, there was the implied warranty that the thing should be free from defects. In other words, the sale should be rescinded and the seller held liable in damages, if the object of the sale was found to possess concealed or latent defects,[4] whether known to the seller or not. Ulpian thus expounds the reason of the rule: "The seller is bound even though he was ignorant of the defects, nor is the rule unjust, for the seller could have known them (nec est hoc iniquum, potuit enim ea nota habere venditor)" or, as we should say now, the law will impute that knowledge to him.[5]

The French law is virtually a reproduction of the Roman law. Sale is treated as a contract or convention. The seller has two principal obligations, that of delivering the thing and that of guaranteeing the thing which he sells. Delivering is the transferring the thing sold into the power and possession of the purchaser (en la puissance et possession de l' acheteur). The warranty due from the seller relates to two objects: (*a*), peaceable possession, (*b*), freedom from latent defects (defauts cachés).[6]

[1] Sandars, Institutes of Justinian, 360.

[2] Institutes, Lib. iii, Tit. 23, 53: Quia sane qui nondum rem emptori tradidit, adhuc ipse dominus est.

[3] D. 19, 1, 11, 18.

[4] Ortolan, Tome 3, page 279.

[5] D. 21, 1, 2

[6] Code Napoléon, Title, 6, c. 1.

In Mussulman law, sale signifies an exchange of property for property with the mutual consent of the parties. Sale is completed by declaration and acceptance. A sale is valid either for ready money or for a future payment, provided the period be fixed. A sale is wholly void, if the description of the goods be at all fallacious; for instance, if a person sells two pieces of cloth, on the condition of their being of a particular quality, and one of them afterwards proves to be of a different quality, the sale is completely void, that is, does not even hold good with respect to the true one. In a sale of goods for goods, or of money for money, it is necessary that both parties make the delivery at the same time. If a person having purchased and taken possession of an article, should afterwards discover it to have been defective at the time of sale, it is at his option either to take it for the full price, or to reject it, because one requisite, in an unconditional contract of sale, is that the subject of it be free from defect; when, therefore, it proves otherwise, the purchaser has no option; for if the contract were obligatory upon him, without his will it would be injurious to him. He is not, however, at liberty to retain the article, and exact a compensation on account of the defect, from the seller; because, in a contract of sale, no part of the price is opposed to the quality of the article, and also because the seller does not consent to be divested of the property for a less price than that which he stipulates; if, therefore, the purchaser were to retain the defective article, and exact a compensation from the seller on account of the defect, it would be injurious to the latter; but it is possible to obviate the injury to the purchaser by permitting him either to retain the article, if he approve of it with the defect, or to reject it. It is, however, otherwise, if the purchaser at the time of the sale or of taking possession be aware of the defect. This will be deemed as a waiver. Again, when a purchaser consents to take a thing with all faults, he will be precluded from rescinding the sale.[1]

In English law, "a contract of sale" is used to describe both a sale out and out, or as it is sometimes called, a bargain and sale, and a contract to sell.[2] It should be observed that there are always two stages in a transfer. There is first of all a contract between the parties, and then there is the passing of the thing from the one to the other. In some cases, the real act of transfer follows so quickly upon the antecedent transaction of contract that there is no room for complication; but there are, also, cases where the real act of transfer may remain in abeyance; and it is then that questions of difficulty are likely to arise as to the rights of the transferee in relation to third parties. Ordinarily, a contract is said to create rights as between the parties to it. In the language of Jurisprudence, a contract merely creates what are called rights *in personam*, and it

[1] Hamilton's Hidaya.

[2] Holland's Jurisprudence, 191*n*.

is not until a transfer has taken place, that the transferee acquires the rights which are known as rights *in rem*. Upon the completion of a transfer, the transferor from that moment becomes, so to say, non-existent, that is, his rights and responsibilities in relation to the thing are entirely extinguished, and altogether merged in the transferee, and the world must thenceforth look to him alone as the owner. Thus, the necessity of determining the constituent elements of the act or fact of transfer is one of vital importance in the eye of the law. There is no real difficulty when the delivery has once taken place; for then the party in possession, as will be explained more fully afterwards, is the party to whom the world must look to in the first instance; but the question which has been much agitated in the English courts is one with regard to the effect of a contract of sale as between the parties to the contract and third parties. Consider that (i) the contract itself may be *in fieri*, (ii) the contract may be completed by means of proposal and acceptance, and (iii) not only the contract completed, but also conveyance executed.

In a very early case, *Cass* v. *Ruddel*,[1] the defendant, on the behalf of Jeremiah Tilly, entered into articles to purchase of the plaintiff, *four* houses at *Port Royal*, in *Jamaica:* by which articles the plaintiff covenanted to convey, and the defendant on behalf of *Tilly*, covenanted to pay 800£ for the purchase thereof and afterwards 100£ was paid in part. The bill was for a specific performance of the articles of the contract. The defendant insisted that the plaintiff had not made out a good title to the houses, by which means the agreement had not been performed, and pending the suit, the great earthquake happened at Jamaica, in which the *four* houses in question *(inter alia)* were entirely destroyed and swallowed up; and, therefore, such agreement ought not now to be decreed in *specie*, but the plaintiff rather left to recover what damages he could at law. But the court, notwithstanding the estate *pendente lite* was destroyed and gone, decreed a specific execution of the articles. And the same was afterwards affirmed upon appeal to the House of Lords.

In *Paine* v. *Meller*,[2] there was a contract for the sale of houses, which from defects in the title could not be completed on the appointed day. The treaty, however, proceeded upon a proposal to waive the objections upon certain terms. The houses being burnt before a conveyance was executed, LORD ELDON observed, "As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes; they are vendible as his, capable of being incumbered as his, they may be devised as his, they may be assets, and they would descend to his heir." So the conclusion come to was, that the purchaser was bound to pay the purchase money, if he

[1] 2 Vernon's Rep. 280, (1692).

[2] 6 Ves. 349, (1801).

accepted the title, notwithstanding the destruction of the houses in the meantime.

In *Seton* v. *Slade*,[1] the question arose whether under the circumstances of the case, the intended vendee could resist the performance of the contract of sale on the ground that the title was not made out, nor possession delivered by the stipulated time of payment. "The effect of a contract for purchase," in the words of LORD ELDON, "is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here (that is, in the Court of Chancery). The estate from the sealing of the contract is the real property of the vendee. It descends to his heir; it is devisable by his will; and the question, whose it is, is not to be discussed between the vendor and vendee; but may be to be discussed between the representatives of the vendee. Therefore I do not take a full view of the subject upon the question of time, unless that is taken into consideration; and many very nice and difficult cases may be put, in which the question would be to be discussed between the representatives, founded upon the conduct between the vendor and vendee. It is obvious, that a due consideration of the value of the objections will embrace that consideration also. The cases seem to have varied a good deal. The cases before LORD THURLOW proceed upon this; that in the nature of the thing there must be a degree of good faith between the parties, not to turn round the contract upon frivolous objections. As to the contract of the party, the slightest objection is an answer at law. But the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, not merely as to the time, but an alteration of the circumstances affecting the value of the thing, or objections arising out of circumstances, not merely as to time, but the conduct of the parties during the time, unless the objection can be so sustained, many of the cases go the length of establishing, that the objection cannot be maintained."

In *Wall* v. *Bright*, PLUMER, M. R. observed;[2] "the contract to sell is a disposition of the estate, and by it the purchaser parts with his right and dominion over it. It is in equity no longer his; he is considered constructively to be a trustee of the estate for the purchaser, and the latter as a trustee of the purchase-money for him. They are so considered by construction only; but in many instances the court acts upon that notion, as in cases between the heir and executors of the vendor or purchaser, if they die before the sale is completed, and in giving the purchaser the right of disposing of it, by a subsequent will, in the same manner as other real estates. Therefore, to suppose the party intentionally to devise for purposes of his own, that which he cannot thus dispose of, is open in some measure to the same objections, but we are to

[1] 7 Ves. 264, (1802).

[2] 1 Jacob and Walker's Reports, p. 500, (1820).

consider whether it does exactly come up to the case I have adverted to. Now, though there is a great analogy in the reasoning, with respect to the will of a naked trustee and that of a constructive trustee, on the ground of the impropriety of their attempting to dispose of the estate, yet for many purposes they stand in different situations. A mere trustee is a person who not only has no beneficial ownership in the property, but never had any, and could, therefore, never have contemplated a disposition of it as of his own. In that respect he does not resemble one who has agreed to sell an estate, that up to the time of the contract was his. There is this difference at the outset, that the one never had more than the legal estate, while the other was at one time both the legal and beneficial owner, and may again become the beneficial owner, if anything should happen to prevent the execution of the contract; and in the interim, between the contract and conveyance, it is possible that much may happen to prevent it. Before it is known whether the agreement will be performed, he is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not, therefore, pursue the analogy between them too far. The agreement is not for all purposes considered to be completed. Thus, the purchaser is not entitled to possession, unless stipulated for; and if he should take possession, it would be a waiver of any objections to the title: the vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till then it is uncertain whether he may not again become sole owner; the ownership of the purchaser is inchoate and imperfect; it is in the way to pass, but it has not yet passed. If the purchase-money has not been paid, the purchaser cannot cut timber on the estate; a Court of Equity will restrain him at the instance of the vendor. In this respect he is not in a situation similar to that of a naked trustee without a remnant of property, but has for certain purposes a power over the beneficial estate. While a suit for a specific performance is pending, nice questions may arise, and it is settled that the vendor may complete the title while under investigation in the master's office. The purchaser is not bound till the title is made out, and suppose the will to be made in the interim. Then there is a contract to sell, which the other party has refused to adhere to; the title is doubtful, and it is uncertain whether it can be completed. Is he not then, if making his will in that state of things, to make a disposition of the estate? The vendor is, therefore, not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will

ever have to convey, and he retains for certain purposes, his old dominion over the estate. There are these essential distinctions between a mere trustee, and one who is made a trustee constructively, by having entered into a contract to sell; and it would, therefore, be going too far to say that they are alike in all respects; the principle that the agreement is to be considered as performed, which is a fiction of equity, must not be pursued to all its practical consequences. It is sufficient to say that it governs the equitable estate, without affecting the legal."

The case of *Lysaght* v. *Edwards*[1] is one of great importance. It is, in fact, a brief history of the English law from its very commencement on the subject of the relation between the parties to a contract of sale in respect of immoveable property. All the authorities are there collected, and differences carefully pointed out and explained. There the plaintiffs entered into a contract for the purchase of real estate. After the title had been accepted, and before completion, the vendor died, having by his will prior to the contract given his personal estate to E., whom he appointed executor, and devised all his real estate to H. and M. upon trust for sale, and having also devised to H. alone all the real estate which at his death might be vested in him as trustee:—Held, that the real estate contracted to be purchased by the plaintiffs passed to H. under the devise of trust estates. Note the observation of JESSEL, M. R.:—"It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of LORD HARDWICKE, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid; in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, *viz.*, possession of the estate and a charge on the estate for his purchase-money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it. So, although there

[1] L. R. 2 Ch. D. 499 (1876).

has been a valid contract of a sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; while in the other case there will not be conversion, because there never was in equity a valid contract. Now, what is the meaning of the term "valid contract?" "Valid contract" means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser—a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for, however bad the title may be, the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase-money is unpaid, the contract is valid and binding; and being a valid contract it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all these cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity. That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such accident. If it is a garden and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than

that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase-money, and his right to enforce his security against the estate. With those exceptions, and his right to rents till the day for completion, he appears to me to have no other rights. In *Shaw* v. *Foster*,[1] the general proposition is, I think, laid down by every one of the noble lords who made a speech on that occasion. LORD CHELMSFORD says:[2] "According to the well-known rule in equity, when the contract for sale was signed by the parties *Sir William Foster* became a trustee of the estate for *Pooley*, and *Pooley* a trustee of the purchase-money for *Sir William Foster*." LORD CAIRNS says:[3] "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner, in the eye of a Court of Equity, of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property"—that interest being, as I said before, a charge or lien upon the property for the amount of the purchase-money. LORD O'HAGAN says:[4] "By the contract of sale the vendor, in the view of the Court of Equity, disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money"—that is, perhaps, not quite accurate—it is not "a trust for the payment of the purchase-money," but it is a charge or lien—however, he meant the same thing—"or as LORD WESTBURY has put it in *Rose* v. *Watson*,[5] "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in equity transferred by that contract." This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee," by which I understand him to mean "a mere trustee." He has already said that he is a trustee, and he is not now distinguishing the vendor's position from that of a trustee, but distinguishing it from that of some other kinds of trustees. His Lordship continues: "Thus as it is stated by the Master of the Rolls in *Wall* v. *Bright*,[6] "The vendor is not a mere trustee; he

[1] Law Rep 5 H L, 321. [2] Law Rep 5 H. L, 333 [3] *Ibid*, 338
[4] Law Rep 5 H L, 349 [5] 10 H. L C, 678. [6] 1 Jac. and W., 508

is in progress towards it' "—that is, towards being a mere trustee—" 'and finally becomes such when the money is paid, and when he is bound to convey.' " The LORD CHANCELLOR (LORD HATHERLEY) says[1] " My Lords, I should stop here, and not say a word more, were it not for what I consider to be a very singular misapprehension which occurred with reference to some expressions in my judgment, and which expressions have occasioned the infliction upon your Lordships (for which I am sure I owe the House an apology) of the citation of authorities to prove the elementary proposition that the moment that a contract for sale and purchase is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the vendee. It is but a constructive trust." He uses the expression, "the vendor becomes a constructive trustee for the vendee," and then he goes on to say that he thinks upon consideration, that he had not gone beyond the view of SIR THOMAS PLUMER; and he disposes of that by saying he thinks his own expressions were not different from those of SIR THOMAS PLUMER. It is immaterial to consider that; for he states the doctrine in perfect accordance with every one of the other noble Lords, including LORD O'HAGAN, if you correct the expression of LORD O'HAGAN in the manner in which I am sure he would have corrected himself had his attention been called to it. It must, therefore, be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into."

In *Rayner* v. *Preston*,[2] a vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. The contract, contained no reference to the insurance. After the date of the contract, but before the time fixed for completion, the house was damaged by fire, and the vendor received a sum of money from the office.[3] It was contended that the purchaser who had completed the contract was entitled as against the vendor to the benefit of the insurance. Upon this, there was a difference of opinion among the Judges. "It was said," COTTON, L. J. proceeded to observe, "that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way

[1] Law Rep 5 H L, 356 [2] L. R. 18 Ch D. 1. [3] L. R 18 Ch D p 1.

a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred, and the right to recover the money accrued before the day fixed for completion.[1] LORD JUSTICE BRETT took the same view, and observed:—"But there did exist a relation between the plaintiffs and the defendants, not with regard to the subject-matter of the contract, but with regard to the subject-matter of the insurance. There was a contract of purchase and sale between the plaintiffs and the defendants in respect of the premises insured. It becomes necessary to consider accurately, as it seems to me, and to state in accurate terms, what is the relation between the two people who have contracted together with regard to premises in a contract of sale and purchase. With the greatest deference, it seems wrong to say, that the one is a trustee for the other. The contract is one which a Court of Equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested, that when that takes place, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back, the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due, and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say, that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a Court of Equity will, under certain circumstances, decree a specific performance."[2] JAMES, L. J., on the other hand, expressed a difference of opinion to this effect:—"I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case, the plaintiff's contention

[1] L. R. 18 Ch. D. p. 6.

[2] L. R. 18 Ch. D. Pp. 10—11.

is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence. I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust.* I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract, while the contract is *in fieri* the relation of trustee and *cestui que trust.* But that is, because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri.* But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust.* That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust.* This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner."[1]

Note the observation of BRETT, L. J., in a subsequent case, *Castellain* v. *Preston.*[2] "The defendants," the learned Judge proceeded, "were the owners of property consisting partly at all events of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment would oblige those third persons, if they fulfilled the contract to pay the agreed price for the sale of that property, a part of which was a house, and according to the peculiarity of such a sale and purchase of land or real property, the vendees would have to pay the purchase-money, whether the house was before the date of payment burnt down or not."

Such being the general relation between the parties to a contract of sale, it will be necessary to consider specifically what are the mutual duties of the parties one towards the other in respect of the subject-matter of the property on the one hand, and the purchase-money on the other, in a contract of sale.

[1] Pp 12 and 13.

[2] L. R. 11 Q. B. D. 385.

In *Phillips* v. *Silvester*,[1] a dispute arose between the trustees for a deceased vendor (Nanney) and a purchaser, the purchaser (Silvester) claiming to be entitled under his agreement to the additional piece of land. The trustees filed a bill and obtained a decree for specific performance, excluding the additional piece of land. The trustees had not allowed the purchaser to take possession of the rest of the land, whilst the purchase-money remained unpaid, and in the meantime the rest of the land was allowed to lie waste. "By the effect of the contract," in the words of LORD SELBORNE, L. C., "assuming there to be no ground on either side for simply setting it aside, according to the principles of equity, the right to the property passes to the purchaser, and the right of the vendor is turned into a money-right to receive the purchase-money, he retaining a lien upon the land which he has sold until the purchase-money is paid. Let us for a moment suppose the case of any other description of security, and that the holder of the security insisted, for his protection, upon entering into possession of the land over which the security extended—then is not such a person so entering into possession answerable, when the account under the security comes to be taken, for keeping the property in the condition in which a person in possession ought to keep it? I apprehend that he is so answerable; and, on principle, I can see no reason why a vendor, who insists upon continuing in possession of the land over which he has security—the contract being one which, in the view of a Court of Equity, has changed the title of the land—I see no reason why such a vendor should not be under the same obligations as those under which any other person would be, who, having security on land, insisted on the possession of the land as a further security. He, when the account comes to be taken between himself and the purchaser, will be entitled to credit for all proper expenditure for the purpose of maintaining the purchaser's property in a proper condition, as against the account of rents and profits to which he is necessarily subject. He will receive, on the other hand, the interest which, by the contract, he is entitled to receive. Perfect justice is done in that way; and it is wholly unimportant, as it appears to me, that he has the right, which undoubtedly he has, to insist upon retaining possession until payment of the purchase-money is made and the conveyance is accepted. He has that right; but the question is, upon what terms that right is to be exercised? It appears to me that it must be upon the terms of his undertaking the duties of possession while he insists upon retaining possession. He is *pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person. In this particular case, it so happens that the vendors, after Mr. Nanney's death, were

[1] L. R. 8 Ch. Ap, 173.

his trustees. Supposing this contract had gone off—supposing that the purchaser had been unable to complete—would they have discharged their duty to their *cestuis que trust* by leaving the property in this condition? It is plain that, if they set up their duty to their *cestuis que trust* as a reason (and it may be a very sufficient reason) why they would not give up the property without payment of the money, they undertook towards those *cestuis que trust* the very same duties which, in my judgment, they undertook towards the purchaser, if it turned out that the beneficial interest was in him. So I should have regarded the case, apart from authority. The vendors run no serious risk if they take that course, assuming always that the property is worth being preserved. No doubt there might be special circumstances tending to shew that it was not worth being preserved, if the expenses of the necessary repairs would be greater than those which the property would bear. In that case it is very possible that a purchaser might have no claim if previous notice were given to him that, unless he would supply the vendors with funds in order to make the necessary repairs, the property must be left to take its chance. But no case of that kind is alleged here. There is nothing whatever to shew, or to suggest, that this was not property which would bear the expense of keeping it in a proper state of repair; there is nothing to shew, or to suggest, that the purchaser was not a person who could be made responsible for anything that might become due from him in pursuance of the contract. I entirely agree, that the vendors were acting in their strict right, and were doing nothing wrong in insisting, as they did, upon retaining possession until the purchase-money was paid, yet, on the other hand, I cannot admit that that is any reason why they should be exonerated from the obligations attaching to persons insisting upon remaining in possession. As far as appears, they would have incurred no risk in allowing possession (the purchase-money remaining unpaid) to be taken by a solvent and responsible purchaser, retaining, as they might have done, their lien for the purchase-money over the estate. They were not bound to do so; but they cannot play fast and loose, and in one breath say, "The time has come when you might have taken, and ought to have taken, possession, and, therefore, you must bear the consequences of all the subsequent deterioration;" and in another breath say, "We have a right to refuse you possession, and we choose to exercise that right." Now, the authorities appear to me to be entirely consistent with this view. One or two were referred to, but they simply come to this—that from the time when the party might have taken possession, and when it was his duty actually to take possession, if he does not do so, he may be answerable for deterioration. I have no doubt whatever, that if in this particular case, the plaintiffs had sent to Mr. Silvester, and had said, "We are perfectly willing to let you go into possession subject to the question between us," and Mr. Silvester had said in reply, "I am willing to take possession, but I am not willing to pay the purchase-money;" or if

he had said, "I will not take possession unless you give me a conveyance, and the whole thing is cleared up," Mr. Silvester would have put himself within the reach of those authorities. In that case, according to the contract, if the time for taking possession would have come, possession would have been offered to him, and there would have been no obstacle or impedi[illegible] except one which, in the exercise of his strict rights, he [illegible] created. But although it is true that each party is entit[illegible] the possession until the whole contract is completed, it is [illegible] the parties differ upon some subordinate question as to the [illegible] the contract, whether in the form of the conveyance o[illegible] party being minded that the contract should go on—it is [illegible] possession to the vendor would be a departure from t[illegible] proceeding. Possession may be changed before completio[illegible] the purchase-money before completion is not according to [illegible] proceeding, although sometimes the money is [illegible]d into [illegible] that, in that state of things, there being proof of c[illegible]less, [illegible] tonly negligent conduct on the part of the plaintiffs, w[illegible] dilapidations, the purchaser must be allowed to set o[illegible] payable by him the amount of rent which might have [illegible] amount of deterioration."

In the *Earl of Egmont* v. *Smith*,[1] the question arose as [illegible] to relet the property sold if it should become vacant befor[illegible] purchase. JESSEL, M. R., there said, "Now I have to c[illegible] law of a vendor who, having sold estates subject to year[illegible] is not compellable to determine, at the request and conven[illegible] gives notice to the tenants to leave. I assume that, withou[illegible] side, but by reason of those accidents to which all hum[illegible] it is impossible to complete on the day originally named, a[illegible] informed, and knows before the day arrives, that it will be [illegible] consequently the farms will be vacant on the quarter-day b[illegible] of the purchase. What is his legal position? I think i[illegible] the notices at the request of the purchaser, which he was [illegible] at least before reletting the farms to consult the purchaser [illegible] them relet, and he should give him notice that he intends to relet them. That it is his duty and obligation to relet them I have no doubt whatever. He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same rights and liabilities; but he is a trustee. For that I have the decision of the HOUSE of LORDS in *Shaw* v. *Foster*,[2] which only related what had been the well-known law of the Court of Chancery for centuries. As a trustee it is his duty to keep the property in a proper state of cultivation, reasonable regard being had to incurring a liability on his part. No one can pretend for a moment that

[1] L. R. 6 Ch. D. 469.

[2] L. R. 5 H. L., 321.

a trustee of farms performs his duty by allowing these farms, situate, perhaps, in one of the finest Counties in England and readily rateable, to remain unlet and run the risk of losing the rent. It cannot be pretended for a moment that a trustee performs his duty who does that, or that a trustee who does that voluntarily and knowingly will not expose himself to a serious liability to the *cestui que trust* who loses his rent. I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain suf- [illegible] keep the farms in a good state of cultivation. That, I have [illegible] to the general law. Whether the vacancy happens in the ordinary [illegible] of determining the tenancy either by the landlord or the tenant, or [illegible] the vacancy happens because the landlord gave the notice at the request [illegible] the purchaser, appears to me, as regards the subsequent liability, wholly im- [illegible] I think it is the proper course that the vendor [illegible] should give notice of [illegible] ing vacancy to the purchaser, and ask him what he wishes to be done; [illegible] the purchaser say, I am willing to run the risk of the farms being [illegible] I will guarantee you against any loss that will arise to you in case [illegible] it might be a proper thing to allow them to remain [illegible]

[illegible] observed that upon a contract of sale the parties stand to [illegible] fiduciary position. In the nature of things, "there must be [illegible] faith between the parties." In the first place, the seller must [illegible] title to the estate sold; and at law if the seller cannot make [illegible] estate sold, the purchaser is not compellable to take the part [illegible] be made,[1] and Equity will then only compel the purchaser [illegible] the part to which a title cannot be made is not necessary to the [illegible] but in that case will of course allow a proper abatement [illegible] purchase-money. In fact what Equity looks to is, whether the agree- [illegible] being performed in substance.

[illegible] place, although in strict morality a vendor may be expected [illegible] all the defects in the estate itself, in the eye of the law he is bound [illegible] such defects as could not be known to the buyer, but which the [illegible] was acquainted with at the time of the sale. "If the person," in the [illegible] of Lord St. Leonards,[2] "to whom you sell was aware of all [illegible] estate, of course he cannot impute bad faith to you in not [illegible] what he already knew, neither will you be liable if you were yourself ignorant of the state of the property; and even if the purchaser was at the time of the contract ignorant of the defects, and you were acquainted with them, and did not disclose your knowledge to him, yet he will be without

[1] Lord St. Leonards: Handy Book of Property Law, 8.

[2] Handy Book of Property Law, 16.

a remedy if they were such as might have been discovered by a vigilant man; if, however, you should, during the treaty, indirectly prevent the purchaser from seeing a defect which might otherwise have easily been discovered, the contract would not bind the purchaser." In other words, the contract will be deemed to be fraudulent, if the vendor should be found to have suppressed the fact of any latent defect in the property, or fraudulently disguised a defect which would otherwise have been patent. In the case of a patent defect it being the duty of the purchaser who is understood to treat at arm's length with the vendor to be careful of his interest, and conduct himself with ordinary prudence, the principle of *caveat emptor* will fasten him to the contract and Equity will not relieve him.

In *Shirley* v. *Stratton*,[1] there was a bill for the specific performance of an agreement for the purchase of an estate in marsh-land at Barking in Essex and for payment of a sum of 1,000£, the purchase money; the defence was that the estate was represented to the defendant as claiming a neat value of 100£ per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames which would be a outlay of 500£ per annum; and it appearing, upon evidence, that there had been intentional concealment of the circumstance of the wall during the treaty, Lord Thurlow dismissed the bill.

In *Brooks* v. *Round*,[2] the object of the bill was to obtain a specific performance of an agreement entered into by the defendants to purchase a meadow; the principal objection made by the defendant was that the premises were described as a meadow, consisting of fifteen acres without any notice of a way round, and a footpath across it. The way round appeared upon the evidence to be only a footpath, and it also appeared that the meadow was of a house and ground adjoining. Lord Loughborough, L. C. said, "Certainly the meadow was very much the worse for a road going through it, I could not help the carelessness of the purchaser who did not choose to enquire, nor was it in his opinion a 'latent defect.'"

In *Petre* v. *Petre*,[3] the relief was granted to the purchaser when the material transaction in connection with the fraudulent act could not have been known with reasonable diligence by the party.

In *Hill* v. *Gray*[4] the agent of the vendor of a picture, knowing that the vendee laboured under a delusion with respect to the picture which materially influenced his judgment, permitted him to make the purchase without removing that delusion and the sale was held void. The facts were these:—A person named Butt had been employed by the plaintiff to sell the picture in question. The defendant, being desirous of purchasing it, pressed Butt to inform him whose

[1] 1 Bro. C. C. 440, (1785).

[2] 5 Ves. 506, (1800).

[3] 1 Drewry's Rep., 397.

[4] *Ex relatione* Keate's case, 10 C. B. 591.

property it was; which the latter refused to do. In the course of the treaty, Butt being at that time employed in selling a number of pictures for Sir Felix Agar, the defendant, misled by circumstances, erroneously supposed that the picture in question was also the property of Sir Felix Agar. Butt knew that the defendant laboured under that delusion, but did not remove it; and the defendant, under this misapprehension, purchased the picture. The plaintiff [illegible] the testimony of the most eminent artists, that the picture [illegible] genuine Claude, and of great value: and it appeared, that, after the sale [illegible], and after the defendant had been informed that the picture [illegible] erty of Sir Felix Agar, he had objected to pay for it, not [illegible] ny deception that had been practised with respect to the [illegible] the ground that the picture was not a genu[illegible] d: "Although it was the finest [illegible] genuine Claude. LORD [illegible] not be sold under a decepti[illegible] picture that Claude ever [illegible] to his o[illegible] under a deception. The agent ought to have [illegible] opriet[illegible] riginal stipulation, that he should not communicate [illegible] e k[illegible]or, and not to have let in a suspicion on the part of the [illegible] si[illegible]new, enhanced the price. He saw that the defendant had [illegible] on in supposing the picture to be Sir Felix Agar's, and yet [illegible]t. I take for granted that you will be able to prove, by the [illegible] first professional artists, that this is a genuine picture of [illegible] ould not be possible to go further. In Italy, the fact might [illegible] oof; as, where a picture has been long preserved in a parti- [illegible], it can only be proved by the concurrent judgment of artists [illegible] This case has arrived at its termination, since it appears [illegible] r laboured under a deception, in which the agent permitted [illegible] point which he thought material to influence his judgment." [illegible] *ames*,[1] SHADWELL, V. C. approves of the law as laid down by [illegible] (LORD ST. LEONARDS) on the subject of defects, namely, that [illegible] ne time of the contract does not know of the existing defect [illegible] urt will enforce the contract, otherwise, perhaps, if the defect [illegible] ndor." On the subject of disclosures or, in the playful words [illegible] RDS, "what truths a seller must, and what falsehoods he [illegible] be said generally that the seller may crack up, commend, or [illegible] th impunity. The observations of FRY, J. in *Davies* v. *London and Provincial Marine Insurance Company*[2] are worthy of consideration. "Where parties," says that learned Judge, "are contracting with one another, each may, unless there is a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say, that there was a duty to disclose, to shew that the duty existed. Now undoubtedly that duty does in many cases exist. In the first place, if there

[1] 7 Hare's Rep., 418, (1849).

[2] L. R. 8, Ch. D. 474, (1878).

be a pre-existing relationship between the parties, such as that of agent and principal, solicitor and client, guardian and ward, trustee and *cestui que trust*, then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by an agent, by his solicitor, by his guardian, or by his trustee. The pre-existing relationship involves the duty of entire disclosure. In the next place, there are certain contracts which have been called contracts *uberrimæ fidei*[1] where, from their nature, the Court requires disclosure from one of the contracting parties. Of that description there are well-known instances to be found. One is, a contract of partnership, which requires that one of the partners should disclose to the other all material facts. So in the case of marine insurance, the person who proposes to insure a ship or goods must make an entire disclosure of everything material to the contract. Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true, and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement; although if he had said nothing he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which is true at the time, but which during the course of the negotiation becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances."

Upon the doctrine of *caveat emptor*, it will be necessary to refer to the case of *Clare* v. *Lamb*.[2] There a Mrs. Steiner, who possessed seven leasehold houses in the Mile End Road, mortgaged them in 1863 to one Dodd for 300£., and afterwards further charged them with 100£. to a Mr. Watson. In 1864, Mrs. Steiner married Dr. Lamb, who died in 1869, having by his will appointed the defendants his executors. Shortly after the death of Dr. Lamb, Dodd, the first mortgagee, with the concurrence of the executors, put the premises up for sale by public auction, and Clare, the plaintiff, became the purchaser for 785£. The purchase-money was, with the sanction of the executors, applied in part in paying off the two mortgages, and paying the expenses of the sale and conveyance; and the balance, 241*l.* 8*s.* 2*d.*, was paid by Clare to the executors. The conveyance was executed by all the parties, and Clare received possession of the premises from Dodd. The deed contained no covenant for title in the executors. In 1872, Mrs. Lamb, the widow of Dr. Lamb, discovering that she was entitled to the property, filed a bill in Chancery against Clare to recover possession. Clare gave notice of this claim to the defendants, Dr. Lamb's executors. On the 21st of February, 1874, a decree was pronounced in the suit, treating Clare

[1] "Of utmost faith."

[2] L. R 10 C. P. 338.

as the assignee of the mortgagees, and directing an account, and that the surplus, after deducting the mortgage-money, interest, and expenses, should be paid over by Clare to Mrs. Lamb. Clare then (in October, 1873,) brought this action against the defendants to recover back the money which he had been called upon to pay to Mrs. Lamb, *viz.*, the value of the equity of redemption. GROVE, J. there said :—"The question arises thus :—Certain property was sold by auction, and by the conveyance, to which the defendants were parties, a mortgage was transferred to the purchaser, and the equity of redemption, the value of which was agreed to be 240£., was also conveyed to the purchaser. It turned out that, so far as the equity of redemption was concerned, the title of the vendors was wholly defective. Their testator, Dr. Lamb, having died, it was discovered that the equity of redemption was in his widow; and she filed a bill in Equity, and a decree was made declaring her to be entitled to it. The question submitted at the trial was, whether the purchaser, having paid 240£. for property to which the vendors had no good title, could recover back that sum as money had and received, upon a failure of consideration. In answer to the plaintiff's claim, it is contended that the maxim *caveat emptor* applies; and that, the defendants, as executors, having acted *bonâ fide*, and in the belief that they had a good title, the plaintiff must take what he has got, and cannot recover back the money he has paid. It seems to me, upon principle, irrespective of the authorities, that the maxim referred to applies *à fortiori* to this case. If a man goes into a shop to buy a chattel, the seller, especially if he be the manufacturer, must necessarily know more of the nature and quality of the article than the buyer can. In that case, the rule *caveat emptor* is often a hard one, and yet it generally applies. In the case of the purchase of an interest in land, the person who sells, places at the disposal of the buyer such title-deeds as he possesses and under which he claims. The purchaser has full opportunity for investigating the title of the vendor, and when he takes a conveyance he is assumed to have done so. Considerable inconvenience might result if this were not the rule. Conveyancers may agree upon the title, and, long after the conveyance has been executed, the whole transaction completed, and the proceeds disbursed, the seller might be called upon to return the purchase-money, by reason of some defect of which he had no notice at the time." But there is an ordinary and well-known covenant which the purchaser may insist upon if he wishes to get more security than he gets by an investigation of the title; he may require a covenant for title; this additional security would probably increase the price. When the conveyance has been executed, all that the purchaser has to look to is the liability of the vendor under the deed. If it contains no covenant for title, the purchaser takes what the vendor gives him, or, rather, what he is able upon his title to give him, and the vendor will only be responsible for his own acts and incumbrances. Such I believe to be the general doctrine. Now, the principal author-

ities upon the question before us are *Bree* v. *Holbech*,[1] *Johnson* v. *Johnson*,[2] *Cripps* v. *Reade*,[3] and *Hitchcock* v. *Giddings*.[4] In addition to these, we have the high authority of one of the most eminent judges and writers upon the law of real property, *viz.*, LORD ST. LEONARDS. In *Bree* v. *Holbech*, the defendant, a personal representative, having found among the papers of the deceased a mortgage-deed for 1200£., assigned it to the plaintiff for a valuable consideration, the deed of assignment reciting, that it was a mortgage-deed made or mentioned to be made between the mortgagor and mortgagee for that sum; and, after the lapse of six years, it was discovered that the supposed mortgage-deed was a forgery, and the purchaser thereupon brought a suit for money had and received to recover back the sum he paid for it. But LORD MANSFIELD said: "The basis of the whole argument is fraud. But here everything alleged in the replication may be true, without any fraud on the part of the defendant. He is an administrator with the will annexed, who finds a mortgage-deed among the papers of his testators, without any arrears of interest, and parts with it *bonâ fide* as a marketable commodity. If he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different. He did not covenant for the goodness of the title, but only that neither he nor the testator had encumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." That is a distinct authority to show that the purchaser must look to his covenant, and that the maxim *caveat emptor* applies. In *Johnson* v. *Johnson* the purchaser was evicted for a defect of title after payment of the purchase-money, but before the conveyance was complete, and he was held to be entitled to recover back his money. LORD ALVANLEY thus expresses himself:[5] "We by no means wish to be understood to intimate that, where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in one action for money had and received. Every purchaser may protect his purchase by proper covenants: where the vendor's title is actually conveyed to the purchaser, the rule *caveat emptor* applies." Nothing can be more specific than that. His Lordship goes on: "In the present case the plaintiff never has had any title conveyed to him, and therefore we are of opinion, notwithstanding, that the party sued is a legatee, that the plaintiff has paid his money under a mistake: consequently, the rule adopted in Courts of Law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid, in an action for money had and received." LORD ST. LEONARDS, at page 441 of the 13th edition of his book on Vendors and Purchasers, sums up the results of

[1] 2 Doug 654, *a*

[2] 3 B. and P., 162.

[3] 6 T. R. 606.

[4] 4 Price, 135.

[5] 3 B. and P. at p. 170.

the authorities thus: "But, if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." For this he cites several cases in equity, besides the cases I have already referred to. Not only have we the high authority of ST. LEONARDS for the doctrine I am adverting to, but the rule is substantially stated in the same terms in Dart's Vendors and Purchasers, 4th ed. p. 711. There is only one case which *primâ facie* looks the other way, *viz.*, *Hitchcock* v. *Giddings*.[1] There, a purchaser bought the supposed interest of the vendor in a remainder-in-fee expectant on an estate tail, and it turned out that at the time of the contract the tenant-in-tail had suffered a recovery, of which both parties were ignorant until after the conveyance was executed and a bond given for securing the purchase-money. The Court of Exchequer, in the exercise of its equitable jurisdiction, relieved the purchaser against the bond, on the ground of fraud. LORD CHIEF BARON RICHARDS, in giving judgment, said: "This is certainly a charge of fraud; for, it is that the defendant, having no title to any interest in these estates at the time of the contract, bargained as if he had, and that thereby he prevailed on the plaintiff to give him this bond. Now, if a person sells an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, this is certainly a fraud, although both parties should be ignorant of it at the time; and that I believe to have been the case here. I must not be told that a Court of equity cannot interfere where there is no fraud shown. If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a Court of equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive 5000£. and interest, because the conveyance is executed and bond given for that sum as the purchase-money, when in point of fact I had not an inch of the land so sold to sell? That was precisely the case with the present defendant, and it would be hard indeed if a Court of equity could not interfere to relieve the purchaser." The distinction between that case and the present is obvious,—there, the vendor was seeking to enforce performance of the contract by compelling the purchaser to pay for a thing he had not got; here, the plaintiff is calling upon the vendors to refund money which they honestly believed themselves to be entitled to when they received it. 'Potior est conditio possidentis.' It does not appear to me that that case interferes with the doctrine laid down by the high authorities I have referred to, which, regard being had to the usual course of conveyancing, seems to me to be just."

[1] 4 Price, 135.

You have just seen that a vendor, with knowledge of the fact, is bound to disclose latent defects; but it seems that a purchaser is not bound to inform the vendor of any latent advantage in the estate.

In *Fox* v. *Mackreth*,[1] LORD THURLOW said:—"And without insisting upon technical morality, I do not agree with those who say that when an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside; suppose, for instance, that A knowing there to be a mine in the estate of B, of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate, without considering the mine, could the Court set it aside? Why not, since B was not apprised of the mine, and A was? Because A, as the buyer, was not obliged from the nature of the contract to make the discovery. It is therefore essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery. The Court will not correct a contract, merely, because a man of nice honour, would not have entered into it; it must fall within some definition of fraud: the rule must be drawn so as not to affect the general transaction of mankind."

Nor will the mere fact that the estate happened to have been sold at an undervalue, of which neither of the parties was aware at the time of the contract, entitle the vendor to set aside the transfer.

In *Okill* v. *Whittaker*,[2] the plaintiffs were trustees, for sale, of, amongst other property, certain leasehold premises, which they held under a demise executed in 1755, for a term of three lives and twenty-one years; and in March 1836, they put the leaseholds up to auction under particulars of sale, in which they were advertised to be sold "for the remainder of a term of twenty-one years, which commenced on or about the 3rd of December 1823," the plaintiffs being then under the impression that the last survivor of the lives had died at that time, although the last life did not in fact drop until March 1835. The property not having been sold at the auction, they agreed a few days after to sell it under the same description to one Whittaker for 300£; and by an indenture, dated the 22nd of March 1835, after reciting the indenture of demise, and "that the last survivor of the lives died on the 3rd of December 1823, when the term of twenty-one years commenced; and that the plaintiffs had agreed with Whittaker for the sale thereof to him for 300£ for the residue then unexpired of the lease;" it was witnessed that in consideration of the said sum of 300£, the plaintiffs, in exercise of the said power, &c., assigned the premises to Whittaker, "to hold the same for all the residue then to come and unexpired of the said

[1] 2 Bro. c. c. 419, (1788).

[2] 2 Ph. Rep., 338.

term of twenty-one years granted by the said lease, and which term commenced on or about the 3rd of December 1823." The purchase-money was duly paid, and Whittaker took possession of the premises, and remained in such possession till his death in 1842, when they passed to the defendants, his executors. In 1845 the plaintiffs filed this bill, alleging that they had lately discovered their mistake as to the time when the last life dropped, and praying that, under the circumstances, it might be declared that Whittaker was in equity only entitled to the premises for the residue of a term of twenty-one years, computed from the 3rd of December 1823, and that the defendants might be decreed to re-assign them, and to account for the rents as from the 3rd of December 1844. KNIGHT BRUCE, V. C. dismissed the bill. On appeal LORD COTTENHAM upheld the decision. He remarked :—" Suppose a party proposed to sell a farm, describing it as " all my farm of 200 acres," and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a re-conveyance of the farm, or payment of the difference? Clearly not, the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial."

In the next place, it will be necessary to note the rights of the vendor on the property itself for the whole or any part of the purchase-money. These rights are included in the term, " vendor's lien."

Consider the words of BOWEN, L. J. in *Castellain* v. *Preston*:[1]—" In this case, the vendors have been paid the whole of their purchase-money; even if they had not been paid, but had still the purchase-money outstanding, they would have had some beneficial interest in the nature of their vendor's lien; an unpaid vendor's lien is worth something."

In *Crockford* v. *Alexander*,[2] the plaintiff having contracted to sell an estate to the defendant, the latter obtained possession from the tenant, and began to cut timber, upon which a bill was filed, and a motion made for an injunction. The question was, whether the act of the defendant was one of trespass or waste. LORD ELDON there said, " Although at law this defendant is a transferee, he is in equity by the effect of the contract the owner of his estate, having taken possession under the contract; and the vendor is in the situation of an equitable mortgagee."

As the vendor, so likewise the purchaser has a lien upon the estate in the hands of the vendor to the extent of the purchase-money he may have paid under the contract.

[1] L. R. 11 Q. B. D. 405.

[2] 15 Ves. 138, (1808).

In *Rose* v. *Watson*,[1] in the words of LORD CRANWORTH, "there can be no doubt that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him for the legal estate, and he is, in equity, considered as the owner of the estate; when, instead of paying the whole of the purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid the purchase-money, to that extent the vendee is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent." Indeed, under a contract for the purchase of an estate where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and in equity transfers to him a corresponding portion of the estate.[2] It should be noted that in the foregoing case, the failure of performance of the contract was attributable entirely to the vendor, who had accompanied the contract by such representations as were the inducement to the purchaser to enter into it; but which representations he was unable to fulfil [3] In that case, a distinction was pointed out in argument by the Attorney-General (SIR ROUNDELL PALMER, afterwards LORD SELBORNE) as to lien between the case of a vendor and a vendee; the lien of the vendor was said to depend on the contract, whereas the lien of the vendee, it was said, could only arise when the contract had been destroyed.[4]

It may be mentioned that when one person pays for the vendee under a contract of sale the purchase-money or any portion of it, he may be treated as an assignee of the vendor's lien to the extent of the sum or sums advanced by him.

In *Maddison* v. *Chapman*,[5] an estate had been contracted to be purchased by a woman, who married leaving part of the purchase-money unsatisfied, which was paid by her husband, who took the conveyance to himself and devised: PAGE WOOD, V. C. there *Held* that the estate was the property of the wife, subject to a charge in favour of her husband for the amount of purchase-money contributed by him.

In *Neeson* v. *Clarkson*,[6] a man had contracted to purchase a fee simple, he died before he had paid the money after having made his widow his universal

[1] 10 House of Lords cases 683—684, (1864).

[2] *Ibid, per* LORD WESTBURY.

[3] *Ibid*, p. 679.

[4] *Ibid*, p. 677.

[5] 1 Johnson and Hemmings Rep 470, (1861).

[6] 2 Hare, 163. The decision in this case was somewhat adversely commented upon by LORD WESTBURY in *Parkinson* v. *Hanbury*, L. R. 2 H. L, 18.

legatee and devisee; his widow married again, and her second husband supposing himself to be entitled, paid the whole purchase-money under that contract. He then mortgaged the estate, and afterwards conveyed it absolutely to a purchaser who, it was found in the case, had full knowledge of the circumstances under which the second husband, his vendor, had possession of the estate. The widow and the second husband having both died, the heir at law of the widow filed a bill for the redemption of the property, but the purchaser, on the other hand, claimed the right to continue in possession. It was held there that all that the defendant got from the second husband, his vendor, was a lien on the property for the consideration money paid by the second husband, and the defendant was treated in all respects as a mortgagee in possession in a suit for redemption.

Then there is the question, which on the face of it is one of considerable difficulty. That is, how far is it open to third parties to deal with either the vendor or the vendee in respect of the subject-matter of the contract of sale? The difficulty of this subject is inherent in the somewhat intricate relationship which Equity has recognized between the vendor and vendee in a contract of sale. That difficulty, however, has been encountered with the degree of success that was possible to attain under the exigency by means of the doctrine of notice; but the application of that doctrine itself was attended with many risks before some sort of satisfactory solution was ultimately arrived at. The doctrine may be shortly put in this way: whoever deals with the intended vendor or vendee during the subsistence of a contract necessarily incurs a risk; it would therefore appear at the first blush that the assignee of the vendor or vendee takes the property subject to the rights of the vendor and vendee *inter se;* but Equity again intervenes, and, leaving the original parties to the contract to their own rights, gives succour to the third party if he be a transferee for valuable consideration from either the contracting vendor or the contracting vendee, and should it appear that the third party had no notice or rather could not with ordinary prudence have obtained notice of the mutual responsibilities of the parties to the original contract. The subject of notice, however, has a larger extension. It embraces cases of executory as well as executed contracts. Decided cases can best illustrate the doctrine; but it is sufficient to say that the possession of the title deeds, is as a rule the best evidence of the power or freedom of a person to deal with the estate, so far as the responsibilities of parties who deal with him are concerned. In the words of LORD COTTENHAM in *Dryden* v. *Frost*,[1] "a purchaser taking a conveyance from a vendor who has not possession of the title-deeds will take it with notice of any claim which the party in possession of the title-deeds may have."

[1] 3 My and Cr. 670, (1838).

The term, notice, has been thus explained: In *Hiern* v. *Mill*,[1] LORD ERSKINE lays down that "the law imputes that notice, which from the nature of the transaction, every person of ordinary prudence must necessarily have." In *Jackson* v. *Rowe*,[2] LEACH, M. R. observed that although the purchaser in that case may in fact have been ignorant of the settlement, yet in equity he would be fixed with all the knowledge which it was reasonable he should acquire. "A purchaser," says BARON ALDERSON in *Whitbread* v. *Jordan*,[3] "is not indeed bound to use extraordinary circumspection, nor, on the other hand, do I apprehend it to be necessary to make out express fraud on his part; if he be grossly negligent in omitting to inquire, it is at all events sufficient to fix him with notice." SIR EDWARD SUGDEN in his Vendors and Purchasers, states that what is sufficient to put a purchaser upon inquiry, is good notice.[4]

Note the remarks of LORD LYNDHURST in *Jones* v. *Smith*.[5] "The question therefore resolves itself into this, whether, where a party is informed of the existence of an instrument which may, but which does not necessarily, affect the property he is about to purchase, or upon which he is about to advance money, and it is at the same time stated, that the instrument does not affect that property, but relates to some other property, whether, if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled, and that the instrument does relate to the property, he is under such circumstances fixed with notice of the contents of the instrument? Undoubtedly, where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed, and of all other deeds to which it refers: but where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told, that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision that goes the length of saying that if he is misled, he is fixed with notice of the instrument. I am not disposed to extend the doctrine of constructive notice, and in expressing this opinion, I believe, I act in conformity with the opinion frequently expressed by my immediate predecessor. As to the cases which were cited in the argument, many of them have no bearing on this case, and others go to establish principles which are not in controversy, and which do not admit of dispute; but the cases which have the most direct bearing upon the present are *Jackson* v. *Rowe*, *Whitbread* v. *Jordan*, and *Kennedy* v. *Green*, decided first by SIR J. LEACH,

[1] 13 Ves, 120.
[2] 2 S and St., 475.
[3] 1 B. and C., 303.
[4] 3 V. and P., 468. Read the argument in *Jones* v. *Smith*, 1 Phill, 248.
[5] 1 Phill, 253.

Master of the Rolls, and afterwards by LORD BROUGHAM. As to *Jackson* v. *Rowe* the case was this. Mrs. Jackson's mother on her marriage had an estate settled on her for life, with power of appointment in favour of her children. She survived her husband, and executed the power in favour of her daughter, and continued in the receipt of the rents, and married a second husband. On that marriage—I am stating now what must be inferred from the form of the pleadings—she represented that she was seised in fee, and she executed a conveyance in fee to her husband; the husband received the rents during his life, and upon his death, his son claimed the property as heir or devisee. And the contest was between the wife's daughter, Mrs. Jackson, in whose favour the appointment was made, and Rowe the son. It was contended that the husband was a purchaser for value without notice, and, as the consideration was admitted, the question turned on notice. Now it is obvious in that case, that if the husband, at the time of the marriage, had looked at the deed, the only deed under which Mrs. Jackson's mother claimed the property, he must have seen that she had only an estate for life: and it was very properly decided by the Vice-Chancellor, that if he allowed a purchaser for value to hold under those circumstances, it would enable any disseisor to make a marketable title, and on that ground the Vice-Chancellor decided the case in favour of the plaintiff, and no one can find fault with that decision. Either the party did, or he did not, investigate the title; if he did not, he was guilty of great negligence; if he did, he must have seen that the party conveying to him had only an estate for life. It does not appear, to me, therefore, that the case of *Jackson* v. *Rowe* has any very close application to the present case. Then comes *Whitbread* v. *Jordan*, decided by BARON ALDERSON in the Exchequer. The case first came before me, and I have revived my recollection of the facts by looking at the report of it, and it appears to me that that case was decided on the ground, that the learned judge was satisfied that the transaction was not *bonâ fide*, and that the party had purposely abstained from making enquiry, the money being advanced for securing a pre-existing debt; that, in short, there was wilful blindness. That was evidently the impression on the mind of the learned judge, but he said, that even if it were not so, the facts of the case were such as to amount to negligence of so gross a nature, that it would be a cloak to fraud if it were permitted. These were the principles upon which that case was decided, but which do not appear to apply to the present. As to the case of *Kennedy* v. *Green*, a fraud had been committed on Mrs. Kennedy, and for the purpose of accomplishing it, a fraudulent deed had been executed: Green, the purchaser of the estate, had nothing to do with the fraud, and the question was, simply, whether he had notice of it? Generally, notice to an attorney is notice to the client. Mr. Bostock was his attorney, and the question was, whether Bostock had notice? Now Bostock had notice in this particular way. He had been

himself concerned in, and the party guilty of, the fraud: but this court, in opposition to the opinion of SIR J. LEACH, was of opinion that that was not a species of notice which ought to affect Green. But then it was said, and properly said, that even supposing that to be the case, and leaving out of consideration the circumstance that Mr. Bostock knew of the transaction, as having been an actor in it, yet, as an attorney acting for Green, he must, upon the bare inspection of the deed, have had such a suspicion of fraud raised in his mind as to have rendered it imperative on him to make further inquiry; and upon that ground the case was decided in favour of the plaintiff. These were the cases which were pressed most strongly upon me in the argument, but it does not appear to me that they have any close bearing upon the present. Undoubtedly, in the present case, a cautious, prudent, circumspect person would not have advanced money without production of the deed: but that is not the principle on which cases of this sort have been decided. The case of *Cathay* v. *Sydenham*,[1] which was one of the cases cited at the bar, was of this description. A party had notice of the draft of a settlement having been actually prepared: in fact he had himself prepared it. The question was, whether he was to be considered as having constructive notice of the deed itself? Now, a prudent, cautious, and wary person knowing that a draft had been prepared, would take care to inquire before he advanced his money, whether a deed had been executed in conformity with that draft; yet LORD THURLOW held, that a party having notice as a purchaser—the case was that of a trustee, but he put the case of an ordinary purchaser—that the draft of a deed had been prepared, was not to be considered as having constructive notice of the deed itself, unless he knew that the deed had been executed. Suppose that, in this case, the party had been told that there was no settlement: it is quite clear he would not have been affected with notice: still, notwithstanding the statement that there was no settlement on the marriage, a person about to advance his money, if he were a very prudent, cautious, and wary person, would inquire of the connections of the parties, whether or not a settlement had been executed, before he advanced any considerable sum of money. I don't think, therefore, that the present case goes beyond this, that a prudent, cautious, and wary person would have inquired further. The want of that prudence, caution, and wariness is not sufficient, according to the decisions and the principles which have hitherto been acted on, to affect the party with notice. I do not consider this a case of gross negligence: and I am of opinion that the party having acted *bonâ fide*, and having only omitted that caution which a prudent, wary, and cautious person might and properly would have adopted, is not to be fixed with notice of this instrument. I am satisfied that he acted *bonâ fide* in the transaction."

[1] 2 Bro. c. c., 391.

In *Peto* v. *Hammond*,[1] the plaintiffs sold and conveyed a plot of land to the trustees of a building society; though the conveyance contained a receipt for the whole purchase-money, a part only was paid, and the vendors retained the conveyance as an equitable security for the remainder; the land was afterwards divided into lots and sold and conveyed by the trustees to the allottees, who resold them to other persons without notice of the plaintiffs' lien, but who neglected to require the production of the conveyance from the plaintiffs. The lien of the plaintiffs was there held to prevail over the estate of the purchasers. SIR JOHN ROMILLY, M. R. said:—"Various arguments have been addressed to me, which, if acceded to, would, in my opinion, lead to very dangerous consequences. One was that conditions of sale may make it unnecessary for a person to inquire into particular circumstances which otherwise he would be bound to do, and that the dispensing with the necessity of so inquiring takes away from a purchaser any charge of negligence, or any imputation of constructive notice. Now, in the first place a more dangerous doctrine can hardly be conceived, than that two persons may, by means of special conditions of sale, dispose of property in such a manner as to deprive a third person of his rights, and, which without such conditions of sale, they could not effect. It has been usually supposed to be the doctrine of Equity and of law, that no two persons could, by their act, deprive another person of his rights, and yet that would be the effect of this doctrine. But in truth when, by a special condition of sale, a purchaser contracts with the vendor that he will not make certain inquiries which he would otherwise be bound to make, the consequence is, that the purchaser takes on himself the risk; and if by that means he takes a bad title, the loss falls upon him. It is a species of lottery: the purchaser gives less for the land, in consideration of his not requiring a perfect title to be shewn; he is supposed to be compensated by the reduced price he gives for the risk he has incurred by purchasing under special conditions of sale. Observe to what consequences the principle contended for would lead. Suppose a bare trustee, being in possession of property, advertizes it for sale by auction, with a special condition that no one shall be at liberty to require any title previous to his own seisin, and that he shall take merely a conveyance from the vendor, could that deprive the *cestuis que trust* of their right to the property, when, if the deeds vesting the property in the trustees were looked at, it would appear that he had no beneficial interest whatever in the property, and that it wholly belonged to the *cestuis que trust?* Could not the *cestuis que trust* come to this court to obtain a restoration of the land from the person who had bought it, and got the legal estate from the trustee under such circumstances? Would this court allow such a purchaser to say, "I am a purchaser for value without notice and have not been guilty of

[1] 30 Beav., 495.

any negligence, because, under the conditions of sale, I agreed not to inquire how the vendor became entitled to, or acquire the property?" I apprehend that this is a doctrine which cannot possibly be supported. Undoubtedly there is this difficulty, which was pointed out to me in the argument, *viz*, where are you to draw the line, and where are you to say a purchaser shall be affected with the equities, which he would have been affected with if he had required a full sixty years' abstract of title and had seen all the deeds which composed it? I shall not pretend to define where the line must be drawn, but I must deal with each case as it arises. In one I may say that the case comes within the rule, that the purchaser ought to have required and obtained the production of a particular deed, and in another, I may hold that the purchaser was not bound to do so. Each case must rest on its own facts and the particular deed which is in question. But I am of opinion that the present case falls within the line, and the purchasers ought to have looked at the deed in question. Another argument which was addressed to me is, in my opinion, equally untenable, which is, that a person can only be affected with notice of the contents of a deed, without reference to the question in whose custody the deed might be, and that he cannot be affected by notice of what would inevitably have been told him if he had asked for the production of the deed itself. I am of opinion that this doctrine is neither consistent with law or the common practice. In fact, the greater number of vendors execute a deed in the nature of an escrow; ordinarily the purchase deed is brought by the solicitor to the vendor, who executes it, and signs the receipt for the purchase-money, and then returns it to his solicitor, with the understanding that he is not to part with the deed until he receives the purchase-money in exchange for it. Suppose this case:—that the deed being executed, and the receipt for the purchase-money being indorsed, but retained by the vendor's solicitor until the money is paid, and suppose the purchaser, who has not paid his purchase-money, but has been let into possession, then professes to sell to A. B. without producing the deeds under which he claims, can A. B. afterwards say, "I had notice no doubt of this deed, but that only means notice of the contents of the deed, which is in due and proper form acknowledging the receipt of the purchase-money, it is not necessary for me to inquire whether the deed has ever been delivered over to the purchaser." It is true that in the case supposed, the purchaser would not have acquired the legal estate; but he might have done so by payment off of a mortgage, and in some cases the Court has held that the defence of purchase for value without notice is not confined to cases of legal estate, but extends to cases of *bonâ fide* purchasers who have not got the legal estate, where the legal estate is outstanding in a mere stranger without beneficial interest. If the purchaser had inquired for the deed, he would have found that it was not in the vendor's possession, and if he had inquired why it was not, he would have ascer-

tained, that it was not in his possession because the purchase-money had not been paid. I cannot doubt, if the owner of land executed a conveyance to a purchaser and allowed him to be in possession of it, but had retained the deed as a security for the unpaid purchase-money, and that the purchaser had afterwards sold and conveyed it to a second purchaser, that the latter could not claim as a purchaser for value without notice, simply on the ground that he had not asked for the conveyance to his vendor. If he could not have done so, I am totally at a loss to undestand how a purchaser from him, or a third or a fourth purchaser, could have been in a better situation. The fact that the root of the title of all is derived from the first conveyance imposes upon them the necessity of seeing that that conveyance was duly executed, and that it was in the hands of the right person. If this be so, then the only question which I have to consider is this:—whether it being known that the property was to be sold again in a great number of lots, and a minute subdivision of it thereby created, alters the case, and puts the purchasers in a different situation from what they would have been in, if one person had bought the whole of the property? I am at a loss to understand what principle there is, either in law, or in equity, which can vary the contract or vary the law in that respect. It appears that all the purchasers knew was that the plaintiffs had sold the property to the trustees of the society, and that those trustees had conveyed the lots to the several allottees, who conveyed them either directly to the defendants or to other purchasers who afterwards conveyed them to the defendants. The first question material to all is, did the trustees of the society get a good conveyance from the owners of the property? And it does appear to me that it was the bounden duty of every person who bought the land to have ascertained that fact, and that the subsequent minute sub-divisions cannot affect or alter that duty in any respect. This in my opinion affects all the persons who have possession of the land."

In *Gibson* v. *Inigo*,[1] it was said that "the notice of a charge to an indefinite amount, although the notice be inaccurate as to the particular extent of the charge is sufficient to put upon inquiry a party dealing for the property subject to the charge; and if the actual charge afterwards appears to be incorrectly described in the notice it is nevertheless sufficient as a ground for giving priority for the true amount of the charge, as against the party who received the incorrect notice, but made no inquiry."[2]

In *Wilson* v. *Hart*,[3] by an indenture dated 9th December, 1859, the plaintiffs conveyed a piece of land part of a building estate called Pindar Bank estate to R. R. in fee. By the same indenture R. R. for himself, his heirs, executors, and administrators, covenanted with the plaintiffs, their heirs and assigns, to repair the roads, and to erect buildings in the manner therein mentioned; and

[1] 6 Hare, 124. [2] See *Lane* v. *Jackson*, 20 Beav., 535. [3] L. R. 1 Ch. Ap. 463.

further, that no building or buildings erected or to be erected on the said purchased premises, or any part thereof should be used for the sale of ale, beer, or any other intoxicating liquor. R. R. built a house on the piece of land purchased by him, which he subsequently sold to M, who conveyed it to the defendant, Jane Hart in fee. In September 1864, Jane Hart let the house to T as tenant from year to year. T entered into possession of the premises and carried on the business of a grocer and provision-dealer there, and as part of his business sold ale and beer, but not to be consumed on the premises. Thereafter the plaintiff required T to desist from selling ale and beer, and on his refusal a bill was filed against Hart and T, praying that they may be restrained from using the house for the sale of ale or beer, or any other intoxicating liquor. TURNER, L. J. there said: "It cannot I think be denied that generally speaking a purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire, nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates, as much as it applies to a purchaser or mortgagee of free-hold estates, or that it applies equally to a tenant for a term of years; and I cannot see any way to hold that a rule which applies in all these cases ought not to be held to apply in the case of a tenant from year to year. * * I do not think that the mere fact of the landlord's agent having represented that his orders were not to let the house for a butcher's shop was sufficient to absolve the defendant from making further inquiry as to purposes for which it might be used. I may mention that some doubt at one time occurred to me whether the case might not be distinguished upon the ground that his was a personal covenant merely, and that persons dealing with estates, although they might be bound to inquire into matters affecting the estate, might not be bound to inquire into mere personal obligations affecting the owner in respect of the estate; but upon consideration I have thought that this distinction is more plausible than sound, and that it certainly cannot apply to the present case, as there was here no inquiry into the title, and the inquiry, if made, must have resulted in notice of the covenant."

There can of course be no doubt that an assignee of land with notice of a covenant is in the same position as if he were a party to the covenant.[1] On the subject of "notice," it should be carefully borne in mind that "notice" includes not only actual notice, as was referred to on a former occasion, but also constructive notice, or, as was said in argument in *Jones* v. *Smith*,[2] a presumption of notice arising from certain facts, and where the presumption exists, it is so violent that

[1] *Per* FRY, J., *Richards* v. *Revitt*, L. R., 7 Ch. D 224. See, Spencer's case, 1 Smith's Leading Cases, 36, on the subject of "Covenants running with the land."

[2] 1 Phillips, 251.

the Court will not allow it to be controverted by the party against whom it is raised. One may here consult with advantage the Definition of "Notice," already referred to, in the Transfer of Property Act, namely, "a person is said to have *notice* of a fact when he actually knows that fact, or," mark the words, "when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it."[1] Mere want of caution, as was said in *Jones* v. *Smith* by WIGRAM, V. C., is not sufficient to impute constructive notice to a man.

To conclude, in the words of PAGE WOOD, V. C.,[2] "the whole doctrine of notice proceeds upon this, when a man has created a charge affecting his estate, he is not at liberty to enter into any new contract in derogation of the interest which he has created; this Court will not allow him to do the wrong himself, nor will it suffer any third person to help him to do it. No one will be permitted knowingly to enter into a contract with a person so situated, which would redound to his benefit at the expense of the prior incumbrancer. The conscience of a purchaser is affected through the conscience of the person from whom he buys, if that person is precluded by his previous acts from honestly entering into a contract to sell; and therefore any one who purchases with the knowledge that his vendor is precluded from selling, is subject to the same prohibition as the vendor himself."

In British India, the law relating to sale is in the main a faithful reproduction of the law of England.

Upon a contract of sale, the relation of the parties is much of the same character as in England. In an early case, *Chooneelal Nagindas* v. *Samachand Namedas*,[3] it was contended that a certain document being only a *satakut* or preparatory instrument in the nature of articles of agreement, intended to be followed by the execution of a more formal conveyance, and therefore was in itself of no validity to pass any interest in the property which was the subject-matter of the suit; the Privy Council said that, on the assumption that document was genuine, it was sufficient to bind the property, and to give to the party the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title to the houses which were the subject-matter of the contract.

In Waman Ramchandrá's case,[4] in pursuance of an advertisement advertising for sale of certain property, plaintiff entered into a negotiation with the solicitors of the widow and administratrix of the owner of the said property for the purchase of a portion of it. The plaintiff wrote a letter to the solicitors offering to purchase the said property for a specified sum of money on certain

[1] The Transfer of Property Act, s. 3.

[2] *Benham* v. *Keane*, 1 John and H. 702, (1861).

[3] 5 W. R. (P. C.) 111.

[4] I. L. R. 4 Bom., 126.

conditions, and proposing to pay a deposit of a stated amount as earnest-money if the offer was accepted. On the following day the solicitors informed the plaintiff in writing that the widow accepted his offer, and requested him to deposit the earnest-money offered by him in his letter. The plaintiff, accordingly, deposited the earnest-money with the solicitors on the same day and obtained from them a receipt. Instead of completing the contract of sale with the plaintiff and putting him in possession of the property, the widow sold it to other persons. WESTROPP, C. J. there observed that instances were not wanting in the reports of Indian Cases in which the rules of English Courts of Equity had been applied in the mofussil, and specially mentioned Chunilal Nagindas's case, and it was held that the contract, though not fully completed, bound the property.

Under the provisions of the Specific Relief Act,[1] when A contracts to sell a house to B for a lakh of rupees, and the day after the contract is made, the house is destroyed by a cyclone, B may be compelled to perform his part of the contract by paying the purchase-money. Similarly, when in consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life, and the day after the contract has been made, B is thrown from his horse and killed, B's representatives may be compelled to pay the purchase-money. Again, A contracts to convey certain land to B by a particular day; A dies intestate before term day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.[2]

Indeed, the right which is created between the parties in a contract of sale will not only be binding upon the representatives of the parties; but is enforceable under certain circumstances against third parties. In Waman Ramchandra's case the actual vendees of the widow with notice of the previous contract were put aside in favour of the plaintiff who had contracted to purchase.

In Nemai Charn Dhabul's case,[3] the plaintiff sued for specific performance under the following circumstances. One Raja Nemai Dhabul had by an oral agreement agreed to grant two mokururi leases of certain properties to the plaintiff. Afterwards the Raja granted two mokururi leases of the same mouzahs to other persons who at the time of such grant had notice of the Raja's previous agreement with the plaintiff. MITTER, J., held that upon the general, or rather English rule of equity, the plaintiff was entitled to specific relief and the leases to third parties were void as against him.

One reads in the Mitákshará that "in the case of a pledge, a gift or a sale, the prior contract has the greater force; as if a person having mortgaged a piece of land to one person for a valuable consideration, should subsequently mortgage the same piece of land to another for a valuable consideration, the right will be with the first mortgagee, and not with the second; so also in the case

[1] Act I of 1877, s. 13. [2] The Specific Relief Act, s. 27. [3] I. L. R. 6 Cal., 534.

of gift and sale."[1] In the British Indian law, in a competition between an intended purchaser under a contract of sale and the actual purchaser, the latter, in order to succeed must be "a transferee for value who has paid his money in good faith, and without notice of the original contract," as provided by the Specific Relief Act.[2] Here is an example: A contracts to sell certain land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000 to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.

In Seedee Nazeer Ali Khan's case,[3] it was held that notice to a purchaser's agent was constructive notice to his principal so as to fix the latter with a trust or a burden relative to the subject of purchase which without notice he would have escaped. PHEAR, J. there observed: "If a man buys in the face of hostile claims, he runs the risk of those claims eventually turning out to be well founded, whether he at the time honestly thinks he has reason to disregard them or not, he cannot afterwards set himself up as an innocent purchaser without notice."

In Sammakkamdar's case, the plaintiff sued for the recovery of a plot of land on the allegation that he had sold the land to one of the defendants for Rs. 60 and transferred the *patta* thereof to his name, after obtaining from him a counter document to the effect that he would, on payment of such amount, before the expiration of a certain year, deliver possession of the land with the *patta* thereof. It appeared that the vendee had previous to the expiration of the stipulated time for re-purchase sold the land to the other defendant and transferred the *patta* to his name. Upon the finding that the second defendant had no notice of the counter document it was held that the plaintiff was not entitled to recover the land as against the second defendant.[4]

In *Rennie* v. *Gunga Narain Chowdhry*,[5] it was said that "if a vendee purchases for a valuable consideration without notice of *benami*, from one who, in the eyes of the world, is the absolute owner of a property, and who holds that property, to all appearances, under a good and sufficient title, he would be protected from the subsequent acts of the real owner or of his heir, both of whom were parties to the fraud; and that his purchase would hold good against any subsequent sale made by them. The defect in the title was a latent one which the original purchaser could not by any reasonable inquiry have discovered."

Note the provision of section 41 of the Transfer of Property Act, "where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the

[1] Mitákshará, c. III, s. 2 XXIII A.

[2] The Specific Relief Act, s. 27, cl (*b*).

[3] 8 W. R., 399.

[4] 2 Mad. H. R., 14.

[5] 3 W. R., 11.

same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

On this question, the case of *Ramcoomar Koondoo* v. *McQueen*[1] is well worthy of consideration. It explains the point of direct and constructive notice, and enunciates the rule upon which the courts are justified in holding that a purchaser was reasonably put upon his inquiry, and therefore presumed to have had notice. In that case, a certain person executed in favour of one Bebee Bunnoo a deed of sale of a plot of land. The land being leasehold, she was accepted as tenant of the zemindar. Bebee Bunnoo was in fact the mistress of one Alexander Macdonald and they lived together in the house, and that while so living together, he built on the land. Macdonald afterwards made his will bequeathing the land to Bebee Bunnoo, stating that it had been taken in her name, and desiring that on her death it might go to his children by her. After Macdonald's death, Beebee Bunnoo proved his will, and in the inventory filed in court, she described the land as Macdonald's. A few years after, she executed a bill of sale in favour of one Ramdhone, describing the land as her ancestral holding and in no way referred to Macdonald. The bill of sale stated that she conveyed with the consent of the members of her family. The children were infants at the time. The price was Rs. 945, the original price having been Rs. 130 when the lease was bought by or in the name of Bunnoo. The zemindar accepted Ramdhone as lessee in her place, and he got possession. He then built a house upon it and let it to one John McQueen, who having married the surviving child of Macdonald and Bunnoo, remained in possession and having failed to pay the rent, Ramdhone brought an action of ejectment, which being undefended, a decree was made and possession obtained. Soon afterwards Bunnoo being dead, John McQueen and his wife brought a suit as devisees in remainder to eject Ramdhone's family. Their Lordships of the Privy Council observed:—"It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the courts in India, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out, shall not be permitted to recover

[1] 11 B. L. R., 46.

upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it. After the discussion which has taken place, the case seems to result in this. Whether or not, under the circumstances of this case, the purchaser ought to have inquired? The High Court thinks he ought to have made inquiry, because of the *status* and position of Bunnoo Bebee. The learned counsel, who has argued this case for the respondents (McQueen and Mrs. McQueen) does not himself rely upon that circumstance as one which ought to have put the purchaser upon inquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her children upon this estate, and sometimes letting it, which should have put any one upon inquiry whether she was the real owner or not. It is admitted that, if an inquirer had gone to the office of the zemindar, or to the public registry, he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have money to purchase for herself, or that others might not have purchased by way of gift to her. But circumstances have been relied upon at the bar which were not adverted to by the High Court. In cases of this kind the circumstances which should prompt inquiry may be infinitely varied; but, without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular inquiry ought to have been made. It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry which might be expected to lead to some result. * * There is evidence that Macdonald had built upon the property, but supposing inquiry had been made, and the fact ascertained, it would not lead to the inference that contrary to the apparent title, he had purchased the land for himself; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living. The other circumstance relied on is, that in the deed of sale from Bunnoo, she says she made the sale with the consent of her family. If this had been shown to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained there might have been some ground for the superstructure of argument which was built upon it, but their Lordships have no evidence and no suggestion that this is not in common form; on the contrary it appears that in the deed of sale to Bunnoo herself from her own vendor, the same expression occurs. * * It is very like that which appears after a full conveyance:—"I and my heirs have no longer any claim." These words are often unnecessary, but they are of very frequent occurrence."

Note, however, that every Hindu family is presumably joint in food, worship and estate,[1] and therefore when a purchaser knowingly buys from a member of a Hindu family, notice will be imputed to him, and he will be considered to take subject to the rights of any of the other members.[2] Upon the subject of notice, note further the provision of section 38 of the Transfer of Property Act, "Where any person, authorized only under certain circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part, and the transferor and other person, if any, affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith." The example fully explains the section: "A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her, as such, is insufficient for her maintenance, agrees for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed." Again, "Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands."

I think I ought to mention in connection with this section that some little confusion prevailed in our Courts with regard to the exact nature of a Hindu widow's right of maintenance, in other words, whether the right of maintenance was in the nature of such a charge on the general estate of the deceased owner, as would enable the widow to pursue the estate for the purpose of the maintenance into whatsoever hands it could be found. It may be taken as settled law now, that it is open to the widow in a decree for maintenance to obtain from the Court a declaration of her charge upon the property; but without such a declaration, she is unable to bind the property in the hands of a *bonâ fide* purchaser for value without notice from the heirs. No doubt the widow may proceed personally against the relatives of the husband, but neither the estate in the hands of a *bonâ fide* purchaser without notice nor the purchaser himself, is bound in re-

[1] Neelkristo Deb's case, 12 M. I. A., 540.

[2] *Gobindo Chunder Mukerji* v *Doorgapersad*, 14 B. L. R., 307.

spect of her maintenance. "The lien of a Hindu widow for maintenance," observes JACKSON, J., "out of the estate of her deceased husband is not a charge on that estate in the hands of a *bonâ fide* purchaser irrespective of notice of such lien."[1]

Section 40 of the Transfer of Property Act is in these words: "When for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or when a third person is entitled to the benefit of an obligation arising out of contract and annexed to his ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands." The former portion of the provision contemplates a case like that of *Tulk* v. *Moxhay*, referred to on a former occasion. Consider also the case of *Ramnath Sen* v. *Wise*.[2] There a document recited that out of a certain estate held by the several members of a family, a small portion was sold by the widow of one of the members to one Wise. After the death of the widow, Wise entered into his agreement with the reversioners under an *ikrarnamah*: "I shall personally continue in possession; if hereafter I should have occasion to sell the purchased shares in the remaining *kismats*, then I shall not be at liberty to make gift, sale or other transfer of the said property otherwise than by sale to you or your heirs for the purchase-money as specified in my bill of sale." Wise subsequently gave an *ijarah* lease of the property for 15 years to the defendants who had notice of the *ikrarnamah*, and therefore did not purchase the share out and out. It was argued that the plaintiffs who were endeavouring to enforce the covenant were co-sharers and owners of another share, and had to look to their own comfort and convenience in enjoying the share that remained, and for that purpose it was essential to them that a person owning and possessing the other share should be a person with whom they could maintain comfortable relations. The Court thereupon observed, that it was impossible to resist the conclusion that what the plaintiffs meant to bargain for was, that Wise should personally retain possession of the property, and should not in any way alienate it, or let it go into the hands of others without giving them the refusal, and the option of taking it at the price which he had paid for it, and the claim was allowed.

As an instance of the latter portion of section 40, I shall only quote the illustration to that section: "A contracts to sell Sultanpore to B, while the contract is still in force he sells Sultanpore to C, who has notice of the contract. B

[1] Adhiranee Narain Coomary's case, I. L. R. 1 Cal., 365. [2] 25 W. R., 378.

may enforce the contract against C to the same extent as against A." Read also section 43 of the Act.

The reason for the rule of equity, that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of a prior incumbrance, purchases subject to such incumbrance, is well explained in Dayal Jairaj's case.[1] "The ground of the rule of equity," observes GREEN, J., "that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of the prior right of a third person, purchases subject only to the right of which he so had notice is placed by LORD HARDWICKE in the leading case of *Le Neve* v. *Le Neve* on this, that the taking of a legal estate, after notice of a prior right makes a person a *malâ fide* purchaser; that there is a kind of fraud on his part in this, that, knowing that a prior purchaser has the clear right to the estate, he takes away his right by getting the legal estate, and that fraud or *mala fides* is the true ground on which the Court is governed in cases of notice. The earlier cases on the subject were chiefly cases where one conveyed the legal estate in landed property to another, by way of sale, mortgage or settlement in consideration of marriage, but which property he had previously conveyed or charged, in favour of a third person, by a mode which, for want of a formal deed, or other defect did not pass the legal estate. There the second purchaser, mortgagee or object of the settlement, though taking the legal estate, which had not previously passed from the vendor or settlor, and though giving a valuable consideration, yet was held to take the legal estate, only subject to any right of such third person of which he had notice at the time of paying the consideration or taking the conveyance. The act of the vendor or settlor, in conveying or charging property he had already conveyed or charged in favour of a third person, was held to involve a fraud on the right of that third person; and one who accepted a conveyance or charge from the vendor or settlor with notice of such prior right, though taking the legal estate, and giving valuable consideration, yet, by reason of the notice he had had of such prior right, was treated as an accomplice in the fraudulent conduct of the vendor or settlor, and as holding his estate subject only to the right of which he has had notice. But when a person for valuable consideration accepted a conveyance or charge, without any notice of the right of a third person, which rendered the act of the vendor or settlor in conveying or charging the property a fraud in contemplation of law, then, though the vendor or settlor may be guilty of a fraud, the purchaser is not his accomplice, and the Courts of Equity have seen no ground for interfering with the position of advantage which his holding of the legal estate confers upon him, namely, the right to the possession, enjoyment, and disposal of the property. I say disposal,

[1] I. L R. 1 Bom , 237.

as it would be a very insufficient protection of such a purchaser's right to say he may hold the property undisturbed, but may not dispose of it to the best advantage. In other words, such a purchaser's conveyance to another of the legal estate, with its attendant advantages, is no more a fraud on the right of the third person, of which he had no notice when the property was conveyed to him, and that too, though he may have received notice of such right after his acquisition of the property, than was the acquisition itself by him of the property. And it is well settled that such a purchaser has the right to convey to one who, at the time of the property being conveyed to him, has notice of the right of the third person. In other words, though having notice, he protects himself by reason of taking from one who had no notice, and this by the necessity of protecting the right of free disposal by the latter. It may be considered that, though having notice, such a purchaser does nothing fraudulent in accepting what his vendor had a right to convey. The ground, however, generally given for the principle that a purchaser with notice is entitled to protect himself under a conveyance from one who had no notice, is the very practical one already referred to; that to hold otherwise would be, possibly, seriously to impede, or even wholly to prevent, the *bonâ fide* purchaser without notice from disposing of his property at all. Though, so far as appears, the precise question arising here, whether a purchaser with notice from one who also had notice, but had purchased from one who had no notice, is to be protected, as was his immediate vendor, by the right of the first vendor, has not arisen, yet I am of opinion on a consideration of the authorities that the ground on which a purchaser with notice is allowed to protect himself by reason of having purchased from one who had none, *viz.*, the securing to the purchaser without notice the full benefit of what he had innocently acquired, must be held to protect a subsequent purchaser, however remote, but having notice. I think the proposition in Kerr on Fraud, though not, of course, in itself an authority, is supported by the principles on which the cases on this branch of the rules as to notice are based, the proposition, namely:—"The *bonâ fide* purchaser of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the meditated fraud. If the estate becomes revested in him, the original equity will attach to it in his hands."

It should be observed that Registration plays a very conspicuous part in connection with the matter of transfer in British India; and, thus, much of the difficulties which must arise in respect of evidence as to notice or no notice has been got rid of. "Such perfect security," it was said in *Sobhagchand* v. *Bhaichand*,[1] "is now afforded by Registration that there appears to be hardly room for

[1] I. L. R. 6 Bom., 206.

the plea of purchase without notice." There can be no doubt that the most effective check against secret transaction and collusive transfers is by enforcing publicity in transfers. In the Brahmanic law, publicity is regarded to be one of the essential formalities of transfer. "Acceptance of a gift," and it should be remembered that gift is symbolical of all transfers, "specially of land," in the words of the Shastras, "should be public."[1]

With regard to the importance and necessity of Registration, the authors of the Transfer of Property Act thus observe: "We entirely agree with SIR HENRY MAINE as to the desirability of rendering the system of transfer of immoveable property a system of public transfer; but we must remember that in the absence of a much larger number of registration offices than at present exist in India, the requirement of Registration in the case of every petty transaction relating to land would be an intolerable hardship." In the Transfer of Property Act, "SALE" is a transfer of ownership in exchange for a price paid or promised or part paid and part promised," and in the making of the transfer the principle of the Registration Act has been followed, and it is laid down that sales should be made in the case of immoveable property of the value of Rs. 100 and upwards only by registered assurance, but that in the case of immoveable property of a less value, it may be made either by registered assurance or by delivery of the property. In the case of a reversion or other intangible thing, a registered instrument is indispensably necessary for its transfer[2] In the transfer or conveyance of incorporeal property, when alone and self-existent, formerly, in England, lay the distinction between it and corporeal property. The impossibility of actually delivering up anything of an incorporeal character rendered writing as the most obvious means of conveyance.[3] Delivery is said to take place when the seller places the buyer or such person as he directs in possession of the property. What is possession is nowhere explained in the Act; but it should be remembered that the enjoyment of the produce or receipt of rent from the tenants who may happen to be in occupation is included in the idea of possession.

Note the distinction that has been made in the Transfer of Property Act between a sale and a contract of sale: "A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not of itself create an interest in, or charge upon such property." This distinction does away with what PLUMER, M. R. calls a "fiction of equity," namely, that from the moment of contract the vendor is the trustee and the purchaser the *cestui que trust.* "The vendor," observes that learned Judge, is not a mere trustee, he is in progress towards it, and finally becomes such when the money is paid and when he is bound to convey."[4]

[1] Mitákshará, Ch. 1, s 1, cl. 31.

[2] The Transfer of Property Act, s. 54.

[3] Williams. R., 7.

[4] *Wall* v. *Bright*, 1 Jac. and W., 500.

In the view of the law, a person before he purchases any land or immoveable property should make an inquiry in the Registration office, if he does not do so, he takes the property at his own risk. Now, there need not be a registered assurance for the transfer of land of less value than Rs. 100. In such a case, therefore, possession is absolutely necessary to protect the transfer. Possession is clearly notice to the world of the rights of the possessor, and in reason puts the purchaser of the property upon inquiry as to the rights of the party in possession.[1] Some difficulty and difference of opinion have arisen in the construction of certain sections of the Registration Act which have an important bearing on the question before us, but the consideration of the sections will find a more appropriate place at the close of the subject of transfers. I think I ought to tell you that a prudent purchaser should always do well to inquire about the title-deeds, and understand their contents, which may possibly put him upon further inquiry.

In accordance with the English law, it has been held here that the seller must make out a good title. In Devsi Ghela's case,[2] COUCH, C. J. said that "the rule of English Courts of Equity, that where the vendor of land sues a purchaser for a specific performance of the contract, the defendant is entitled to have an inquiry directed as to the title of the vendor to the lands in question is equally applicable in this country as a rule of Equity." In the words of the Transfer of Property Act, "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and he has power to transfer the same."[3]

Note the observations of MARKBY, J. in Syud Sayet Ali's case.[4] "A warranty of title amounts to a contract by the seller that in consideration of the buyer purchasing the property and paying the consideration money, he (the seller) will make good to the buyer any loss which the buyer may incur by reason of the seller not having a good title to the property. This is an absolute contract from the moment it has been entered into."

In Peary Mohan Soor's case, the duty of the seller to disclose defects is thus stated in conformity with the English law: "Where a vendor, knowing that he had no right or title to property, or being cognizant of the existence of incumbrances or of latent defects materially lowering its value, sold it, and neglected to disclose such defects to the purchaser, there was a fraudulent concealment vitiating the contract."[5]

In *Gajapati* v. *Alagia*, the law as to disclosures was thus laid down: "In the absence of positive law, we are bound in this country to apply the principles

[1] Waman Ramchandra's case I. L. R. 4 Bom., 152.
[2] 2 Bom. H. R., 410.
[3] The Transfer of Property Act, s. 55, para. 2.
[4] 7 W. R., 197.
[5] 7 W. R., 249.

of good conscience and equity; the strict doctrine of the English law relating to real property has never been applied to the mofussil, and it appears to us that it would be manifestly inequitable to attempt to apply them; but even under English law, the vendor is bound to make compensation for a fraudulent concealment of a defect in the title or of an incumbrance. The same rules apply to incumbrances and defects in the title to an estate as to defects in the estate itself. Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to which his covenants do not extend, an exception is made to this rule in the case of a vendor or his agent suppressing an incumbrance or a defect in the title. Even if the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title deeds and the vendor was aware of the defect and concealed it from the purchaser, he is in every such case guilty of a fraud."[1]

Note clause (*a*) section 55 of the Transfer of Property Act: "The seller is bound to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover." Note, also, this illustration to section 22 of the Specific Relief Act: "A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment, B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A."

As it is the duty of the seller to disclose to the buyer any latent defects which he happens to be aware of; so, on the other hand, it is the duty of the buyer to disclose to the seller any latent advantages of which he has knowledge and the seller has not. Section 55, paragraph 5 of the Transfer of Property Act, runs as follows: "The buyer is bound to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware; but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest."

On the subject of the vendor's lien upon the property for the unpaid purchase-money, and, conversely, of the vendee's lien on the property for any portion of the purchase-money paid to the seller, the Transfer of Property Act enacts as follows:—(*a*) "The seller is entitled when the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property *in the hands of the buyer* for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest of such

[1] I. L R. 9 Madras, 91.

amount or part; (*b*) The buyer is entitled, unless he has improperly declined to accept delivery of the property, to a charge on the property as against *the seller, and all persons claiming under him*, with notice of the payment to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and when he properly declines to accept the delivery, also for the earnest, if any, and for the costs, if any, awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission." Note the words I have italicised in (*a*) and in (*b*).

Note, also, that an omission to make such disclosures as are mentioned in section 55, paragraph (1), clause (*a*) and paragraph (5), clause (*a*) is fraudulent under the Act

You have already observed the distinction that is made in the Act between a sale and a contract of sale. "A contract for the sale of immoveable property," in the words of the Act, "is a contract that a sale of such property shall take place on terms settled between the parties; it does not, of itself, create any interest in or charge on such property." It is, therefore, enacted that "when the ownership of the property has passed to the buyer he is bound to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller."[1] Also, that "the seller is entitled to the rents and profits of the property till the ownership thereof passes to the buyer"[2].

It should be borne in mind that the Transfer of Property Act leaves the parties free to make such covenants between themselves with respect to the sale as they for the most part please; and the provisions of Chapter III relating to sale are in the main operative in the absence of a contract to the contrary.

The proviso under paragraph (2), section 45 requires some explanation. Clause 2 says that "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same:" If the facts turn out to be otherwise, he shall certainly be liable for damages, and, moreover, the contract shall be vitiated; but the proviso goes on to say "that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it."

In *Worley* v. *Frampton*,[3] a copyholder agreed to demise a tenement within the manor for sixty-three years on a building lease, and as the custom did not allow a lease to be made for more than twenty-one years, the copyholder agreed

[1] Section 55, paragraph 5 clause.

[2] Section 55, paragraph 4, clause (*a*).

[3] 5 Hare's Rep. 560, (1846).

to execute a lease for twenty-one years, with a covenant for himself, his heirs and assigns to renew the lease for a further term of twenty-one years at the expiration of the first, and for a further lien of twenty-one years at the expiration of the second term. The copyholder died before the lease was executed, having demised the premises to a trustee: *Held*, on a bill by the lessee against the trustee for specific performance, that the trustee having no beneficial interest in the estate, was not bound in the lease for twenty-one years to enter into any covenant for the renewal of the lease at the expiration of that term, and that he could only be required to covenant against his own acts. WIGRAM, V. C. there said, "according to the established practice, I think I cannot compel the trustee to do more than enter into the usual covenant that he has done no act to incumber the property."

Note the provision of section 7, paragraph F of 44 and 45 Vict. c. 41 :[1]— "In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only, namely: That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means thereof, the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof, the person who so conveys is in any wise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."

Exchange is thus defined in the Transfer of Property Act:—"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange." The law of exchange is founded on the principles of the law of sale, of which it in fact forms a part. In Mussulman law, "in a sale of goods for goods, or of money for money, it is necessary that both parties make the delivery at the same time; because being on a par in point of certainty and uncertainty, there is no necessity for a prior delivery."[2]

Note that "Exchange" is defined in the Act not as an agreement; but as the completion of an agreement by mutual transfer of dominion. The law of exchange follows the law of sale, and in consonance with the desire of the legislature that the system of transfer of immoveable property should as far as

[1] The Conveyancing and Law of Property Act

[2] Hamilton's Hedaya, 248.

possible be a system of public transfer, in the case of an exchange of land worth one hundred rupees or upwards, registration is rendered necessary.[1]

Chapter VII of the Transfer of Property Act deals with gifts *inter vivos*, as distinguished, on the one hand, from gifts *mortis causâ*, or "gift of moveable property in contemplation of death,"[2] and devises and legacies on the other. "Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person called the donor, to another called the donee, and accepted by, or on behalf of the donee; such acceptance must be made during the lifetime of the donor and while he is still capable of giving." It follows that "if the donee dies before acceptance, the gift is void."[3] Every transfer of immoveable property by way of gift in order to be valid must be effected by a registered instrument, no matter how small the value of such property may be. The instrument of gift must also be signed by, or on behalf of the donor, and attested by at least two witnesses.[4] Inasmuch as gifts can only be made of existing property, where a gift purports to convey both existing and future property, it is void with regard to the latter.[5]

Moreover, a gift may be revoked under certain circumstances; but any condition to the effect that a gift shall be revocable at the mere will of the donor, is void.[6]

Section 127 of the Act deals with onerous gifts. The subject of onerous gifts bears a seeming analogy to the doctrine of election; but they are clearly distinguishable. The question of election arises where the donor disposes of what belongs to another, it is not so in the case of onerous gifts, strictly so-called.

Note that *mutatis mutandis* the principle of gifts and legacies stands very much on the same footing.

In *Andrew* v. *Trinity Hall*,[7] there was a devise to Trinity Hall of valuable property coupled with the condition that the College should establish certain fellowships under the testator's name. There was also by the same will a gift of 100£ and a plate to the College. It was there argued upon the analogy of the doctrine of election that the legatee must either disclaim the whole gift or take the plate with the property which was charged with the establishment of certain fellowships. It was contended, on the other hand, that the argument was fallacious. "Suppose a person having two legacies rejects one for the benefit of the residuary legatee; can it be said he is not entitled to the other?—The two legacies here are perfectly distinct. The doctrine of election has never been carried to

[1] The Transfer of Property Act, Chap. VI, ss 118—120
[2] Section 129.
[3] The Transfer of Property Act, s. 122.
[4] S. 123.
[5] S 124.
[6] S 126.
[7] 9 Ves. 525, (1804).

this extent. That applies only, where by the same will, under which the legatee takes a benefit, the testator affects to dispose of property, that belongs to the legatee; upon which the Court says, if he will not allow his property to go according to that disposition, the persons claiming under it shall have compensation out of the legacy intended for him." GRANT, M. R. there observed:—"As to the other demand, the legacy of 100£ and the plate, I am at a loss for the principle upon which that is rested. It is compared to election. It has no analogy to that doctrine; which takes place, when one legatee under a will insists upon something, by which he would deprive another legatee under the same will of the benefit, to which he would be entitled, if the first legatee permitted the whole will to operate. What legatee is disappointed by this claim of the 100£ and the refusal to accept the bequest to them upon certain conditions? No one can call upon them to elect, either to accept the trusts of the will, or to give up their legacy. * * It was never laid down that because you refuse one benefit by a will, clogged with some burden, therefore you are to be deprived of another benefit by the same will unclogged by any burden. Suppose a bequest to me of a house to live in it, and afterwards in the same will a bequest of 100£, and I find it inconvenient to live in the house; there is an intention of benefit to me, intending to give me more than I find it convenient to accept of; but that shall not deprive me of the other benefit." This case is really illustrative of the following rule in the Transfer of Property Act:[1] "Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the other onerous."

In *Warren* v. *Rudall*,[2] the question arose upon the application of a devisee who wished to be put into possession of certain freehold property devised to him and his wife for their lives. The objection urged was that inasmuch as the devisee was under the same will a specific legatee of certain leasehold premises which he declined to accept, he was not entitled to claim the freehold under the will without accepting also the bequest of the leasehold, which had become a burden instead of a benefit. The term had, at the testator's death, a few months to run, and the property had been allowed to fall out of repair: PAGE WOOD, V. C. there said: "The question is whether a devisee of real estate, being also by the same will a specific legatee of leaseholds which have become subject to a burden created by the neglect or default of the testator, which the legatee, if he accepted the bequest, would have to bear, is bound to take both estates or neither. There is not much authority on the subject The general doctrine of election has very little bearing upon it. The common case of election is when a testator affects to dispose of an estate which is not his own, and at the

[1] S. 127, paragraph 2.

[2] 1 Johnson and Hemmings Rep, 10, 11, (1860)

same time gives some of his own property to the real owner of the other estate. There it is a simple question of intention, whether there is sufficient indication of an intention on the part of the testator to dispose of what was not his own property. When the Court discovers that intention, it will not permit a person to take anything under the will unless he will allow the whole of the testator's wishes to be carried into effect."

In *Talbot* v. *The Earl of Radnor*,[1] the testator bequeathed a leasehold house to his sister and he also bequeathed to her an annuity for her life. The rent reserved by the lease was higher than the house would let for at the time of the decease of the testator. The legatee disclaimed the gift of the lease, and a question was made whether, if she disclaimed the lease, she could retain the annuity, as she ought not to be allowed to reject the onerous, and retain the beneficial part of the testator's bequest: SIR JOHN LEACH, M. R. was of opinion that as it was the plain intention of the testator that his estate should no longer be subject to the rent of the leasehold house, the legatee could not, in that respect, disappoint his intention, and retain the benefit given by his will, but must take the benefit *cum onere*." It will be observed that section 127 of the Transfer of Property Act is a counterpart of sections 109 and 110 of the Indian Succession Act,[2] and it appears that the illustration under section 110 gives the very case of *Talbot* v. *The Earl of Radnor;* but treats the bequests as two separate and independent bequests. Here is the illustration: "A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He shall not by his refusal forfeit the money." Note paragraph 1 of section 127 of the Transfer of Property Act: "Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully." Compare this section with section 109 to which the illustration is very clear: "A having shares in (*x*), a prosperous joint stock company, and also shares in (*y*), a joint stock company, in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies. B refuses to accept the shares in (*y*). He forfeits the shares in (*x*)." The words, therefore, "in the form of a single transfer" in section 127 of the Transfer of Property Act are to be understood by the light of the above illustration.

[1] 3 My. and K. 254, (1834).

[2] S. 109 is in these words: "Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully." Section 110 runs thus, "Where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of those and refuse the other."

It should be noted that the old rule which compelled a legatee or donee to take the benefits with the burdens proceeded upon the principle that a person cannot at the same time affirm and disaffirm an instrument whether of will or gift. Upon the point of onerous gifts what SIR W. PAGE WOOD says is that the construction of the instrument must follow the intention of the testator or donor.[1]

Note that section 127 of the Transfer of Property Act saves the rules of Mussulman and Brahmanic law, in matters of gifts. These are the words of the section: "Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law." Section 123 relates to the registration and attestation of a deed of gift.

Under the Brahmanic law, "gift consists in the relinquishment of one's own right, and the creation of the right of another, and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise."[2] Acceptance, under that law, is made by one of three means, mental, verbal, or corporeal. However, it was said, in Dagai Dabee's case,[3] that "no case has gone the length of saying that a gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or by permitting the donee to receive rents, or other like act, is in itself a valid transaction, even though the deed of gift be registered." It has been held that the continuance of possession by the donor of the subject of gift will not vitiate the gift where the donor stands in *parentis loco* to the donee.[4] Where a gift is made of a right to possession or a right of entry, possession in the very nature of things is not necessary to render the gift valid.[5] Some doubt was at one time entertained as to the effect of a gift of immoveable property made to a woman, such as a wife or daughter. It has, however, now been settled that the effect of such a gift is to vest the property absolutely in the donee in the absence of any express intention to the contrary.[6]

Next, as to the Mussulman law of gifts. The Mussulman law speaks of three kinds of gift, namely, gift simple and pure, (Hibba), gift for a considera-

[1] *Warren* v. *Rudall*, 1 Johnson and Hemmings Rep, 12.

[2] Mitákshará, c. 3, s. 6.

[3] I L R. 9, Cal. 854

[4] *Maheshurbuksh Singh* v. *Gunoon Kunwar*, 6 W. R 245 See, also, Tara Debi's case, 3 C. L R, 247.

[5] Kalidas Mullick's case, I. L. R. 11 Cal, 121.

[6] Ramnarain Singh's case, I. L. R. 9 Cal. 830, see, also, Kollany Koer's case, 24 W. R, 395.

tion (Hibba-bil-ewaz), and gift in death-illness or deathbed gift, (Marz-ul-maut gift).

It is sufficient to observe that in simple Hibba, possession or seisin must be made over to the donee unless the donee is a child of the donor or in the place of a child. With regard to Hibba, I will refer in the first place to a Madras case. That was the case of *H. H. Azim Unnissa Begum* v. *The Receiver of the Curnatic Property.*[1] The Court there explains and follows the law as laid down in McNaghten's Precedents. "In books of law," the judgment proceeds, "it is expressly stated that if a person dispose by gift of a house to another and continue himself to inhabit it, or even keep some part of his property therein, the gift is void from the circumstance of complete delivery and possession not having been established. Except in the instance of a wife who may give a house to a husband, in which case the gift will be good, although she continue to occupy it along with her husband, and keep all her property therein; because the wife and her property are both in the legal possession of her husband. So also if a father transfer his house to his minor son, himself continuing to occupy it and to keep his property therein, the gift is valid; on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine, his possession is equivalent to that of his son." In Khajoo Koonissa's case,[2] their Lordships of the Privy Council have thus explained the law:—"The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with." In Ameeroonissa Khatoon's case,[3] their Lordships after quoting this passage from Macnaghten's Principles of Mahomedan law,[4] that "when the guardian of a minor is himself the donor, and in possession of the property, no formal delivery or seisin is required," observed "when there is on the part of a father, or other guardian a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor."

Hibba-bil-ewaz, literally, is gift for a consideration; but, so far as I have been able to understand, it is a fictitious sale or, in other words, a gift with the object that the donor should retain possession during his life; possession need not

[1] *Per* Bittleston, J, 6 Mad. H. C. R. 463, (1868).
[2] I. L. R. 2 Cal., 196-197, (1876).
[3] 15 B. L R, 78, (1857).
[4] Ch. V, ss. 9 and 10.

be delivered nor need the consideration be anything more than the merest trifle. Note these observations in Khajoo Koonissa's case, just referred to: "The deed (in this case) was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seisin on the part of the donee." In the case of a deed of gift for a consideration (Hibba-bil-ewaz), in the opinion of the Privy Council, "two conditions must at all events concur, *viz.*, an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount it must be actually and *bonâ fide* paid."

With regard to deathbed gifts, it should be observed that they partake of the character of legacy, and if made without the consent of the heir are valid to the extent of only one-third of the donor's estate. On the subject of deathbed gifts, there is the case of *Ekin Bibee* v. *Ashraf Ali.*[1] It was said that "under Mahommadan law, a gift made in contemplation of death, though not operative as a gift, operates as a legacy. Ordinarily, it would suffice to convey to the legatee any property not exceeding one-third of deceased's whole property, the remaining two-thirds going to the heirs at law, but in the absence of heirs, a will will carry the whole property." In *Enayet Hossain* v. *Kureemoonissa,*[2] the question arose whether the grantor, one Lall Mahomed, when he executed the mokurruree lease, was in that state of illness as made death a probable result. The Court there observed: "Whatever may have been the precise nature of Lall Mohamed's disease, it is abundantly clear that he was very ill when he executed the mokurruree lease, and he died within six months afterwards, without mending during the interval: in other words, he was, when he executed the deed, on what proved to be his deathbed. Under such circumstances the presumption would undoubtedly be that the gift was made in contemplation of death; and that it can only operate as a will and pass one-third of the property."

In Ameeroonnissa Khatoon's case, note the remarks of their Lordships on the subject of *musha* gift, or the gift of a share of an undivided property:[3]—"A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of *musha*, or an undivided part in property capable

[1] 1 W. R., 152, (1864). [2] 3 W. R, 40. [3] 15 B. L. R, 79.

of partition, was, by Mahomedan law, invalid. That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The Hidaya gives the two reasons on which it is founded: first, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, *viz.*, to make a division. Instances are given by text-writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided estate, and confusion might thus be created between donor and donee which the law will not allow. In the present case, the subjects of the gift are definite shares in certain zemindaries, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court, after stating that the shares were for revenue purposes, distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue, and further, that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahomedan law did not apply to property of this description. In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons upon which it is founded do not in their judgment apply to property of this peculiar description of these definite shares in zemindaries which are in their nature separate estates with separate and defined rents. It was insisted in argument that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained *musha*. But although this right may exist, the shares in zemindaries appear to their Lordships to be, from the special legislation relating to them, in themselves, and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to *musha*. It was contended on the other side that the rule applied only to cases where the donor himself retained some share of the property, and not to those where the owner gave all his own interest in undivided shares to the donee. The authorities on Mahomedan law do not seem to be agreed on this point; and after the opinion they have just expressed, their Lordships need not enter upon the consideration of it."

LECTURE XII.

THE MODES OF TRANSFER.

I. MORTGAGE. II. CHARGE. III. LEASE.

Kinds of Partial transfer—Mortgage—Brahmanic law: *Ádhi*—*Ádhi* never absolutely lost to the mortgagor—Manu's dictum—Possession by the mortgagee essential to a mortgage—Yájnavalkya: pledge may be forfeited on breach of stipulation—Debtor bound to substitute or pay if security destroyed—*Charita* pledge—Roman law—*Mancipatio* or *Fiducia* form of mortgage—Pignus—Hypotheca—Possession by the mortgagee not absolutely necessary in Pignus—Ulpian's dictum—Pledge, a real right—Twofold result of pledge—Personal obligation and right to a thing—Mortgagee's right to sell the thing—Priority among mortgagees according to date—Mortgagee's right to sue if thing lost—Mortgagee bound to employ diligence—No sale without notice to the mortgagor in certain cases—Justinian's rule of foreclosure—Two years' grace—Mortgagor might sell or mortgage—Accessions follow the mortgage property—No Registration law—Chirographs, their precedence—Distinction between strict Pignus and Hypotheca—No change of possession in Hypotheca—"Pignus and Hypotheca differ only in sound"—Pignus, its derivation—Mussulman law, Rahan—Bai-bil-waffa—The French law—L'hypothèque—English law—Mortgage, an estate upon condition—*Mortuum Vadium*—*Vivum Vadium*—Littleton's definition of mortgage—The Equity of redemption—Time is essential at law; but not so in Equity—*Seton* v. *Slade*—*Willet* v. *Winnel*—Equity of redemption not clogged by bye-agreement—Secured and unsecured debts—Once a mortgage always a mortgage—*Bell* v. *Carter*—No redemption before stipulated time.—Mortgagee's power to sell the property—The Conveyancing and the Law of Property Act—The relative position of mortgagor and mortgagee—Common Law and Equity—LORD MANSFIELD'S observation—Mortgagee in possession, his rights and liabilities—LORD ST. LEONARDS'S view—*Perry* v. *Walker*—Mortgagee, no allowance for personal trouble—Allowance for improvements—LORD HARDWICKE in *French* v *Baron*—Mortgagee, not liable for natural decay—Mortgagor must redeem whole or nothing—*Watts* v. *Symes*—Priority among mortgagees—Qui prior est tempore, potior est jure—*Jones* v. *Jones*—Priority, how or when affected—Fraud or gross negligence—*Plumb* v. *Flurtt*—*Tourle* v. *Rand*—Distinction between a mortgage and a conveyance with a condition of repurchase—*Alderson* v. *White*—The doctrine of marshalling—Suum cuique tribuere—*Lanoy* v. *The Duke of Athol*—*Aldrich* v. *Cooper*—*Baldwin* v. *Belcher*—No marshalling at the sacrifice of a creditor—*Barnes* v. *Racster*—Mr. Fisher's illustrative explanation—The necessity of writing—The statute of Frauds—Equitable mortgage by deposit of title deeds—*Russel* v. *Russel*—LORD ELDON'S observation—*Ex parte* Mountfort—English law, the basis of British India Law—Presidency Town and Mofussil—Equity and good conscience—Varden Seth Sam's case—Recognition of Equitable mortgage by deposit of title deeds in the Mofussil—The Transfer of Property Act—The Exception to Section 59—Equitable mortgage, its local limitation—The History of Bai-bil-waffa or Kut Cobala—Thumbusawmy Moodelly's case—Mr. Mayne's argument—The Drishtabandhaka of Madras—The Gáhan Láhan of Bombay—Bapuji Apaji's case—Bengal Regulations, their effect—

The relation between usury law and Bai-bil-waffa—Regulation XV of 1793—Regulation I of 1798—Regulation XVII of 1806—Prannath Roy's case—The Transfer of Property Act—Definition of mortgage—*Deojit* v. *Pitámbar*—The four kinds of mortgage—Zari Peshgee, Otti, Kanam—SAN mortgage of Guzerat—Section 58, clauses *b*, *c*, *d*, and *e*,—Writing, Attestation and Registration, necessity of—Right to redeem and Right to foreclose, co-extensive—*Vâdya* v. *Vadya*—The Limitation Act—Foreclosure—Six months' grace in place of one year under the Regulation—Sakhárám's case—No redemption before time—Tacking—When mortgagor may redeem portion—Section 60—Mortgagee's power of sale—Pitambar Naraindas's case—Mortgagee's double right of suit, how—Money Decree and decree for lien—Section 99—Charge—Tacit hypothecs of the Roman law—Privilege of the French law—Lease—Brahmanic—Roman—Mussulman—The Transfer of Property Act—Lessor and Lessee, rights and liabilities—Law of Registration, History of—Cases illustrative—Innocent transferee, how protected—Act XI of 1855—The Transfer of Property Act, s. 51.

The different kinds of partial transfer are Mortgage, Charge, and Lease. In these, as has been already observed, the transferor does not part with the full ownership of the thing; but some interest in the thing which is included in, and may be said to be a factor of, ownership. With the Bráhman's aversion for sale, it is by no means a matter of surprise that mortgage should in the history of Brahmanic law precede sale. "In regard to the immoveable estate," in the language of some ancient legislator, "sale is not allowed; it may be mortgaged by consent of parties interested."[1] The old Brahmanic idea was that a mortgage or pledge was never absolutely lost to the mortgagor, and howsoever long might be the enjoyment of the mortgaged property by the mortgagee, the latter could never acquire an absolute title to it.[2] A pledge, in the words of Nárada, is that which is deposited, and is of two kinds, one to be released at a fixed time, and the other to be retained until payment. And, according to the same author, it is an essential characteristic of a mortgage that the mortgagee should be in possession. "Pledges are valid, if there is enjoyment; but not otherwise."[3] "A pledge not redeemed until the principal is doubled is forfeited; that with a term of redemption fixed is lost on the expiry of that term; but a usufructuary pledge is never forfeited:" is the dictum of Yájnavalkya.[4] Note that the dictum of Yájnavalkya that a pledge may be lost to the pawnor under certain circumstances, and become the absolute property of the pawnee is comparatively a modern idea. Such a result was repudiated by, or rather unknown to, the old law. "Neither a pledge nor a deposit," in the words of Manu, "is

[1] Mitákshará, c. 1, s. 1, para. 32.

[2] Vyàvahára Mayukha: Nárada, आधिः सीमा वालधनं * * नोपभोगेन नश्यति। This is borrowed from Manu: c. viii, v. 149. The words there are "नभोगेन प्रणश्यति"।

[3] Mandlik's Hindu law.

[4] Yájnavalkya, c 2, v. 58 आधिः प्रणश्येद्द्विगुणे धने यदि न मोच्यते। काले कालकृतो नश्येत् फलभोग्यो न नश्यति।

lost to the owner by lapse of time; they are both recoverable though they have long remained with the bailee."[1] A pledge spoiled or destroyed unless by the act of God or the King shall be made good by the creditor;[2] but if a pledge, in the words of Brihaspati, be destroyed by the act of God or the King (*vis major*) the debtor shall be made either to give another pledge or pay the principal with interest, or, in the words of Kátyáyana, if without any fault of the creditor, the pledge be damaged or destroyed, the debtor shall be compelled to deliver another.[3]

Again, in the words of Brihaspati, no pledge can be appropriated by the pawnee or mortgagee, whether the principal is doubled or the stipulated term of redemption has expired, until after a lapse of fourteen days, and, as Vyása observes, upon notice to the debtor's family. It is also said by Brihaspati that, when a forfeiture arises, the creditor may attach the pledge and sell it in the presence of witnesses.

Vasista tells us that in the case of several deeds being passed at the same time with respect to one pledge, he who first gets possession of the thing pledged has a superior claim.[4] Or, in analogy to the language of English law, when equities are equal, the law shall prevail. In the words of Kátyáyana, should a man hypothecate the same thing to two creditors, the first hypothecation shall be recognized and the pawnor punished as for theft. In the case of what is called a *Charita* pledge, that is, when the borrower pledges a valuable article for a small consideration, the article pledged is not lost to the pawnor even if the principal be doubled.[5]

Note that the principle upon which a forfeiture takes place in the case of the debt being doubled by reason of non-payment of interest appears to be that there, ordinarily, the proportion between the value of the pledge and the amount of the debt incurred is considerably diminished, and thereby the security is deteriorated.

In Roman law, "the oldest form of the contract of pledge," observes Mr. Sandars in his note to Justinian's Institutes,[6] "was that of *mancipatio*, or absolute sale of the thing subject to a contract of *fiducia* or agreement for redemption." The word *fiducia* signifies faith or trust, and the only hope of the borrower to get back his property was apparently the character of the lender. The right to

[1] Manu, c. 8, v. 145 आधिश्चोपनिधिश्चोभौ न कालात्ययमर्हतः

[2] Manu, c. 8, v 144 Yájnavalkya, c. 2, v. 59.

[3] Vyavahára Mayukha.

[4] Vyavahára Mayukha.

[5] Yájnavalkya.

[6] Sandars's Institutes of Justinian, 325.

redeem appears to have been of a moral, rather than of a legal nature, and therefore the duty of the lender to restore the property must have been regarded as one of imperfect obligation. Professor Hunter, in his valuable work on Roman aw,[1] refers to a passage in Cicero's *Pro Cæcina* and observes: "Where the law is weak, honour is strong; thus, where a lender, on being paid his money, refused to restore the property, or had deprived himself of the means of doing so, he was held to be infamous." So, the right of redemption in a fiduciary pledge was at best a mere precarious right (*jus precarium*) depending upon prayer or intreaty, and there can be little doubt that on failure of payment at the stipulated time, the borrower even in a moral light became for ever precluded from obtaining the property, or, as we should say now, the mortgage became foreclosed of itself.[2]

The two well-known forms of mortgage in Roman law are the *pignus* and the *hypotheca*. The general name for mortgage or pledge is *pignus*. *Pignus* had for its object not only moveables but also immoveables, and embraced things corporeal as well as incorporeal.[3] *Pignus*, in the words of Ulpian, may take place even without delivery;[4] but according to the same jurist, *that* is strictly *pignus* in which the thing passes to the creditor, but when the possession does not pass to the creditor the transaction is a *hypotheca*.[5]

The peculiarity of a pledge seems to consist in this that it is not merely a contract, but it also relates to real right, or *droit réel*, in the language of Ortolan. In other words, *pignus* not only gives rise to personal obligation as between the debtor and the creditor, but confers on the creditor a right to the thing itself which is the subject of the pledge.[6] The creditor had the right of selling the property and pay himself out of the proceeds, he had the right of pledging the thing pledged, he had precedence over other creditors, and even of constituting himself the owner of the thing if no purchaser could be found. He had also the right to bring a suit against third persons for unlawful detention of the thing.[7] Among several mortgagees the right of precedence is established by the date of the mortgage, the first in date is the first in rank, *prior tempore, potior jure*, that is, prior in time, stronger in right.[8] "A creditor may, according to agreement,"

[1] Hunter's Roman Law, 260.

[2] *Ibid.*

[3] Ortolan's Institutes of Justinian, Lib. 11, Tit. 5: "Ce droit peut avoir pour objet aussi bien les meubles que les immeubles, les choses incorporelles que les choses corporelles."

[4] D. 13, 7, 9. "Pignus contrahitur non sola traditione sed etiam nuda conventione, etsi non traditum est"

[5] D. 13, 7, 9: "Proprie pignus dicimus, quod ad creditorem transit; hypothecam cum non transit neo possessio ad creditorem."

[6] Ortolan's Institutes of Justinian, Tome 3, p. 149.

[7] Ortolan's Institutes; Sandars's Institutes; Hunter's Roman Law.

[8] Ortolan, Tom. 3, p. 358; Sandars's Institutes, 134; Hunter's Roman law, 268.

in the words of the Institutes, "alienate a pledge, although the thing is not his own property; but this alienation may perhaps be considered as taking place by the intention of the debtor, who in making the contract has agreed that the creditor might sell the thing pledged, if the debt were not paid; but that the creditors might not be impeded in the pursuit of their right, nor debtors seem too easily deprived of their property, a provision has been made by our Constitution establishing a fixed method of procedure for the sale of pledges, by which the respective interests of the creditor and debtor are fully secured."[1] As regards the duty of the creditor to take care of the thing while in his possession and restore it to the debtor at the proper time, Justinian lays down: "A creditor also who has received a pledge is bound *re*, for he is obliged to restore the thing he has received, by the *actio pigneratitia;* but inasmuch as a pledge is given for the benefit of both parties, of the debtor that he may borrow more easily, and of the creditor that repayment may be better secured, it has been decided that it will suffice if the creditor employs his utmost diligence in keeping the thing pledged; if, notwithstanding this care, it is lost by some accident, the creditor is not accountable for it, and he is not prohibited from suing for his debt."[2] It seems that the right of sale was inherent in a contract of pledge, and even an agreement to the effect that it shall not be lawful to sell would have been of no avail.[3] According to Ulpian, even if there happened to be a condition, *ne liceat distrahere*, the creditor would have a right to sell, but in that case notice to pay should have been given to the debtor three times (ei ter fuerit denuntiatum ut solvat et cessaverit).[4]

Justinian by his Constitution permitted the parties to fix the time, and place, and manner of sale at their pleasure, and if there was no agreement, sale could be effected after two years' notice, and, after a further grace of two years, if no purchaser were forthcoming the creditor would become the owner of the property pledged.[5]

During the continuance of the mortgage, the debtor was at liberty to sell or hypothecate the thing, but subject to the prior incumbrance. Moreover, all the accessions to the thing under mortgage would belong to the debtor; but, at the same time, the creditor was entitled to derive benefit from them inasmuch as they formed a part of his security. The creditor was also bound to account to the debtor for any profit he may have obtained from the thing, and on the other hand, the debtor was bound to make good any loss that might have arisen owing to any deterioration in the subject of the pledge, and it was his duty to reimburse

[1] Sandars's Institutes, 152, Justinian, Lib II, Tit. VIII, 1.

[2] Sandars's Institutes, 325; Justinian, Lib. III, Tit. XIV, 4.

[3] Ortolan, Tome 2, page 203.

[4] D. 13, 7, 4

[5] Sandars's Institutes of Justinian, 152, 153.

the creditor for any expenses that the latter might have incurred for the preservation of the thing.[1]

Again, a person who clears off an antecedent mortgage is entitled to priority.[2] Priority takes place according to the date of the contract of pledge or hypothecation, and not from the date of possession or the time when the debt was incurred.[3]

It would appear that the Romans had no regular system of Registration of mortgages in the proper sense of the term. Emperor Leo is said to have conferred a privilege on certain kinds of written documents. Mr. Sandars refers to Code VIII, 18, 11, and observes that a *hypotheca* which was created by an instrument publicly registered had a preference over others by a Constitution of Leo.[4] It is certain, however, that chirographs or written instruments of mortgage had precedence over parole mortgage.[5] A learned French writer observes that mortgage in Roman law, unlike the system adopted in the Code Napoleon, was a clandestine transaction.[6]

Note, that beyond the fact that in *pignus* strictly so called the creditor was put into possession of the thing, and in *hypotheca* the debtor continued to be in possession, the legal consequences were, *mutatis mutandis*, the same in either case. "Inter pignus autem et hypothecam tantum nominis sonus differt," is the dictum of Marcianus.[7] *Pignus*, in the opinion of Gaius, is so called from *pugnus*, a fist; because things which are given in *pignus* are made over with the hand (pignus appellatum a pugno, quia res quæ pignori dantur manu traduntur),[8] and that jurist adds that the derivation had led some persons to think that moveables were properly the subject of *pignus*.

In Mussulman law, Rahan is the detention of a thing on account of a claim which may be answered by means of that thing; as in the case of debt. Contracts of pawn are established by declaration and acceptance, and are rendered perfect and complete by taking possession of the pledge. The principle of pawn consists in this that the thing pledged must be constantly detained in the hands of the pawnee; but the thing pledged is also always liable to redemption. It is declared that inasmuch as pledges are taken to be detained with a view to obtain payment of a debt, the pledge of an undefined part of any-

[1] Hunter's Roman Law, 266, 267.
[2] D. 20, 4, 12, 8.
[3] Hunter's Roman law.
[4] Sandars's Institutes, 134.
[5] 3 Ortolan's Institutes of Justinian.
[6] Les Codes Civils E'trangers. Introduction, lxxxix.
[7] 2 Ortolan, 358.
[8] D. 50, 16.

thing whether capable of division or otherwise, is illegal. The thing pledged is considered to be the absolute property of the owner, but with a qualification. As, on the one hand, the pawnee has not the power of selling the pledge without the consent of the pawnor, so, on the other, the pawnor has no right to sell the property without the consent of the pawnee; for, it is argued, the thing pledged is with respect to its worth, the right of the pawnee. The pawnee is not entitled to use the pledge, or to lend it or to let it to hire. The expenses of conservation rest upon the pawnee and those of subsistence upon the pawnor. Every species of increase accruing from a pledge, after the execution of the contract, belongs to the pawnee; as being the offspring of his property; but it is, nevertheless, detained with the original in pawn; for branches are dependent on the stock. Again, as a pawn is detained in behalf of the whole debt, it is, therefore, detained in behalf of every part of it; hence it follows that a part only of the thing pledged cannot be redeemed upon payment of a proportionate part of the debt. It would appear that the pledge is liable to be sold at the instance of the Cazi [1]

Note that, under the Mussulman law and among Mussulmans, it is unlawful to lend money on interest, and this circumstance, coupled with the fact that the pawnee was incapable of using the pledge in any way, paved the way for a kind of mortgage, which afterwards became quite common in Mussulman India, known as the *bye-bil-waffa*. That which religion directly forbade, the instinct of temporal acquisition soon devised means indirectly to evade. Since Islam prohibited the exaction of interest, its votaries taking advantage of the distress of their fellow creatures contrived the means of covertly buying up their properties at nominal prices. It would seem, however, that, in Mussulman countries, the *bye-bil-waffa* did not meet with much favour. In the Hedaya, *bye-bil-waffa* is treated incidentally under the head of *ikrah* or duress. *Ikrah*, it is there said, applies to a case where the compeller has it in his power to execute what he threatens—whether he be the Sultan or any other person as a thief. The reason of it is this, that duress implies an act which men exercise upon others, and in consequence of which the will of the other is set at nought, at the same time that his power of action still remains; where a person sells his property by compulsion, he has still a right, as long as he does not signify his assent to the sale, to take back the article, although the purchaser should have sold it into the hands of another person. It is to be observed that some consider a *waffa* sale to be invalid in the same manner as an enforced sale, and apply to it the rules of sale by compulsion; whence, according to them, if the purchaser in a *waffa* sale sell the article purchased, the sale so made by him may be broken through, as the invalidity of the sale, in this case, is on account of the non-consent of the seller,

[1] Hamilton's Hedaya (Grady), 629—657.

in the same manner as in a case of compulsion,—*waffa* sale is where the seller says to the purchaser "I sell you this article in lieu of the debt I owe you, in this way that upon my paying the debt the article is mine." Some determine this to be, in fact a contract of pawn; for between it and pawn there is no manner of difference, as although the parties denominate it a sale, still the intention is, in effect, a pawn. Now in all acts regard is paid to the spirit and intention; and the spirit and intention of pawn exists in this instance,—whence it is that the seller is at liberty to resume the article from the purchaser upon paying his debt to him: some again consider a *waffa* sale to be utterly null as the purchaser, in the case in question, resembles a person in jest, since he, like a jester, repeats the words of sale, at the same time that the effect and purpose of sale are not within his design. Such sale is therefore utterly null and void, in the same manner as a sale made in jest. The Hanifite Doctors of Samarcand, on the other hand, hold a *waffa* sale to be both valid and useful, as it is a species of sale commonly practised from necessity and convenience, and it is attended with advantage in regard to some effects of sale, such as the use of the article, although the purchaser cannot lawfully dispose of it."[1]

I think I ought to tell you the literal meaning of the expression, *bye-bil-waffa*. It signifies *sale with faith*. In other words, sale with a condition of re-purchase or re-conveyance, the condition being dependent on the faith of the purchaser, or mortgagee. Compare with this the *fiducia* of the Roman law and the *charita* (character) pledge of the Brahmanic Code.

In the French law, Mortgage (*l' hypothèque*) is defined to be a right *in re*, or real right over immoveables affected or charged with the discharge of an obligation; it is in its nature indivisible and subsists in its entirety (en entier) over the whole immoveable property affected by it, and over each and every portion of such property: this charge pursues the property into whatever hands it may pass.[2] There are different kinds of mortgage of which conventional mortgage is said to be that which depends on covenants, and on the external form of acts and contracts.[3] Conventional mortgage can only be consented to by an act passed in an authentic form before two notaries, or before one notary and two witnesses.[4] No conventional mortgage is valid, except that which, either in the authentic document constituting the credit, or in a subsequent authentic act, declares specifically the nature and situation of each of the immoveables actually belonging to the debtor over which he grants the mortgage of the credit. Every article of his present personal property may be by name subjected to mortgage. Future property cannot be mortgaged; nevertheless, if

[1] Hamilton's Hedaya Book, XXXIV.
[2] Code Napoleon, Art, 2114.
[3] Article, 2117.
[4] Article, 2127.

the present and unencumbered goods of the debtor are insufficient for the security of the debt, he may, on expressing such insufficiency, consent that the whole of the property which he may hereafter acquire, shall continue charged as soon as acquired.[1] In case the present immoveable or immoveables, subjected to mortgage, have perished or suffered deterioration, so that they have become insufficient for the security of the creditor, the latter shall be at liberty to sue forthwith for repayment or obtain an additional mortgage (un supplément d'hypothèque).[2] A mortgage acquired extends to all the improvements which may occur in the immoveable mortgaged.[3] The mortgagee can pursue his remedy by a suit for ex-propriation, or ejectment, and, in that case, if the debtor is able to satisfy as to the sufficiency of the income of the estate he will be allowed a year's time to pay up the capital, interest and expenses. The mortgagee may also under certain formalities have the property sold.[4] A purchaser or donee from the mortgagor may get the property exonerated by paying the value of the property to the mortgagee.[5]

Registration, it should be noted, forms, as in most continental systems, an important part in matters of mortgage. Among creditors, a mortgage takes order only from the day of the enrolment made with the keeper of the registers, in the form and in the manner prescribed by the law.[6] The enrolments are made at the office for preserving the mortgages, within the jurisdiction of which is situated the property subjected to mortgage. All the creditors inscribed the same day exercise in concurrence a mortgage of the same date.[7]

Note, also, that independently of mortgage which is said to be of three kinds, legal, judicial and conventional, there are what are called privileges, or liens. Under Title XVIII of the Code, one finds three general enactments: (*a*) whosoever binds himself personally is required to fulfil his engagement out of all his property moveable and immoveable, present and future; (*b*) the goods of the debtor are the common pledge of his creditors, and the value thereof is equally distributable among them, unless there exist among the creditors lawful causes of preference; (*c*) the lawful causes of preference are privileges and mortgages.

Again, privilege is a right which the quality of his credit confers upon a creditor of being preferred to the others, though mortgage-creditors (hypothecaires). Among what are called privileges over immoveables, take these instances, (*a*) the privilege of the seller over the immoveable sold for the payment of the price, or, in the language of the English law, the vendor's lien, (*b*) the privilege of those who have supplied money for the acquisition of an immoveable under

[1] Article, 2129, 2130.
[2] Article, 2131.
[3] Article, 2133.
[4] Articles 2204, 2212, 2185.
[5] Articles 2181, 2184.
[6] Article, 2134.
[7] Article, 2146—2147.

certain circumstances, (*c*) the privilege of architects, contractors, masons and others employed in building, rebuilding or repairing houses, canals or any other works whatsoever under certain circumstances.

In English law, mortgage, it appears, first came into use as a device to evade the law against alienation, and was, in its inception, an estate upon condition. An estate upon condition is said to be an estate whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged or finally defeated. Mortgage came under the denomination of that kind of estate which became defeasible upon condition subsequent.[1] "In process of time," in the words of Crabb, "numerous other conditions were introduced to suit the convenience or humour of the donor, which were termed express or conventionary, and the fiefs to which such conditions were annexed were termed improper fiefs, and, in the time of Edward IV, they had acquired the name of estates upon condition: one of the principal estates of this kind, which has continued to the present period, is that of the *mortuum vadium*, that is, "dead pledge," which, as Littleton observes, was so called because it was doubtful whether the feoffor or mortgagor would pay the sum at the time limited, and if he did not, then the land which was put in pledge was dead to him, and if he did pay, then it was dead to the feoffee or the mortgagee. In the time of Glanville, this species of security was not much favoured in law, but it appears to have been more so in the time of Richard II, for SIR MATHEW HALE observes, that, in the 14th year of this king, the Parliament would not admit of redemption; as this would, however, contrary to the spirit of the times, have encouraged alienation by means of mortgages, it appears that Courts of Equity soon after admitted, that although a mortgage was forfeited by non-fulfilment of the condition, yet if the estate were of greater value than the sum lent thereon, the mortgagor might, at any reasonable time, redeem his estate by paying the mortgagee principal, interest and expenses; which proceeding was afterwards denominated Equity of Redemption."[2]

There was another kind of mortgage known, in early times, as the *vivum vadium*, that is, "living pledge" as distinguished from "dead pledge" In *vivum vadium*, the owner of an estate in consideration of money conveys it to the lender with a condition that as soon as he, the lender, should have repaid himself out of the rents and profits of the land, the principal and interest of the money, the debtor might re-enter. Blackstone describes it as an estate conditioned to be void as soon as the principal and the interest is raised[3] There is yet another kind of mortgage known to the English law under the name of "a

[1] 1 Stephens Commentaries, 303—310.

[2] Crabb's History of English Law, 372.

[3] 1 Stephens Commentaries, 310.

Welsh mortgage," in which, as in a *mortuum vadium*, the mortgagee received the rents and profits. It would appear, however, that, in the one case, the rents and profits were received by the mortgagee in lieu of interest, whereas, in the other case, at all events, originally, the rents and profits were received by the mortgagee without accounts. In a Welsh mortgage, the mortgagee cannot foreclose or sue for the money, though the mortgagor or his heirs may redeem at any time.[1] In a Welsh mortgage, therefore, the estate can never be wholly lost to the mortgagor or his heirs.

Littleton describes a mortgage as "a feoffment," or regular conveyance, conditioned to be reconveyed to, or "with a condition for re-entry by, the mortgagor upon the payment of the debt at a certain day:—"If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day a certain sum of money lent, then the feoffor may re-enter, if he doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken from him for ever."[2] This was the old or Common law, and in the eye of that law, the mortgagee was regarded as the real owner. He was in possession, and it was he that enjoyed the fruits. But there arose by the side of the Common law courts, a court which adopted the rules of equity and good conscience, and, disregarding the strict letter of the contract that held fast the mortgagor to the exact moment of time for the performance of his obligation to pay his debt, not only gave the mortgagor a further period to liquidate his debt, but held the mortgagee accountable for any gains or profits he may have derived from the pledge. In other words, the Court of Chancery gave the mortgagor an opportunity to recover his property within a reasonable time, after his failure to pay the money at the day stipulated between the parties. This right to recover after the contract time came to be called the *Equity of Redemption.*

In *Seton* v. *Slade*,[3] Mr. Romilly stated in argument that "there is no such principle that time is essential here (in Chancery) as well as at law, and that it is always dispensed with upon the conduct of the party. That would exclude Courts of Equity from a great part of their jurisdiction. The only ground for the redemption of a mortgage is, that time is essential at law, yet in equity, as the real intention is a loan of money, and the party may be put in as good a situation, it shall not be so considered. In those cases, a *dictum* of LORD THURLOW has been frequently alluded to, that if a clause was inserted, excluding the jurisdiction of this Court, if the mortgagor should not redeem within a year, still the mortgagor would be entitled to redeem." LORD ELDON'S observations in the case are highly instructive:—"To say time is regarded in this Court, as at

[1] Coote on Mortgage, Fisher on Mortgage, Snell's Principles of Equity.

[2] 1 Fisher's Law of Mortgage, 262.

[3] 7 Ves., 271, (1802).

law, is quite impossible. The case mentioned of a mortgage is very strong, an express contract under hand and seal. At law the mortgagee is under no obligation to re-convey at that particular day; and yet this Court says, that though the money is not paid at the time stipulated, if paid at the time stipulated with interest at the time a re-conveyance is demanded, there shall be a re-conveyance; upon this ground, that the contract is in this Court considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine, upon which this Court acts against what is the *primâ facie* import of the terms of the agreement itself, which does not import at law, that once a mortgage always a mortgage; but equity says that, and the doctrine of this Court as to redemption does give countenance to that strong declaration of LORD THURLOW that the agreement of the parties will not alter it; for I take it to be so in the case of a mortgage, that you shall not by special terms alter what this Court says are the special terms of that contract."

Consider the old case of *Willet* v. *Winnell*.[1] There, the plaintiff was the youngest son of his father who was seised according to the custom of the manor of a copyhold tenement of Borough English of a certain value per annum, and the plaintiff's father, having borrowed a sum of money from the defendant's father for securing the same, made a conditional surrender into the hands of two customary tenants of the manor to be void on payment of the debt with interest on the expiration of a year; and, at the same time, the defendant's father entered into a bond that if the principal and interst should not be paid at the day, then if the defendant's father should pay to the plaintiff's father, his executors, administrators or assigns a further sum of money in full for the purchase of the premises within ten days afterwards that the bond should be void, or otherwise stand in full force. The plaintiff's father died before the mortgage was forfeited leaving the plaintiff an infant of two years old, and the principal and interest not being paid at the day, the defendant paid the further sum of money the next day after the mortgage was forfeited to the administrator of the plaintiff's father, according to the condition of the bond. The plaintiff in course of time brought a Bill to redeem on repayment of the principal and interest, discounting the profits; the defendant by answer insisted it was an absolute purchase. Upon this the Court decreed a redemption, "making no doubt but it continued a mortgage, and was not an absolute purchase; but as to the further sum declared that to be well paid to the administrator, and therefore ordered the whole monies with interest to be repaid and costs, discounting the mesne profits." This case is an early exemplification of the doctrine that the equity of redemption cannot be clogged by any bye agreement; but, it should be borne in mind that the rule does not interfere with a purchase

[1] 1 Vern, 487, (1687).

of the equity of redemption by the mortgagee as a distinct and subsequent transaction, nor does it preclude an agreement by the mortgagor, at the time of the loan, to give the mortgagee a right of pre-emption in case of a sale during the continuance of the security.[1]

Understand that there are two kinds of debts, one secured, and the other unsecured. I may borrow money from you on a promissory note, or on a bond, or without any writing at all. Now for this debt I am personally liable to you; in default you are entitled to proceed against me for any rights of property that there may be in me, or, in other words, against any kind of property that I may have. This is an instance of an unsecured debt, and the remedy for it. A secured debt, on the other hand, is when I borrow so much money from you and for that loan I actually undertake, in the event of default, to part with my proprietary rights to a certain thing to the extent of the debt. A man after having borrowed money on a bond or promissory note may sell or otherwise dispose of his property, so long as the act does not amount to a fraudulent transfer, and may thus leave no proprietary right in himself against which his creditors may proceed; but when one has borrowed money on the security of a thing, the debtor may dispose of the thing in any way he may choose; but the creditor's right to realize the debt from the thing will avail against the whole world. A mortgage is a kind of security. In the first place, what is a security? A security is a redeemable estate or right which one person has in the property of another, for securing the payment of an existing or intended debt or charge.[2] Mr. Fisher has thus defined a legal mortgage: "Mortgage (proper) is an assurance to the creditor of the whole or part of the debtor's general property, in real or personal estate, conditional upon the non-payment, and redeemable at law upon payment of, a debt at a fixed time; and, upon breach of the condition, becoming absolute at law, and redeemable in equity, until the expiration of a certain period; unless the right of redemption be sooner foreclosed by judicial process at the suit of the creditor, or be destroyed by sale under judicial process, or under a power incident to security."[3] It is clear from the definition that a mortgage may take effect either with or without possession. And what is really necessary to consider are the mutual rights of the mortgagor and mortgagee. Now, you have seen how jealous the law is of the rights of the mortgagor. Wherever the law finds signs of a mortgage, it will liberally enforce the right of redemption: "Once a mortgage, always a mortgage," is a time-worn maxim. You have seen that a special condition in derogation of the equity of redemption will not avail, nor will the mere absence of the usual clause of redemption alter the character of a mortgage transaction.

[1] Fisher on Mortgage, 687. Coote on Mortgage, 20.

[2] Fisher's mortgage.

[3] Fisher. Introduction, LXXII.

In *Bell* v. *Carter*,[1] T conveyed certain lands to the plaintiff and his heirs, on trust, in case a debt of a certain amount and interest thereon should not be paid on a specified day, to sell the same by public auction or private sale, and out of the proceeds of the sale, to pay the principal, interest and costs, and pay over the surplus, and to re-convey the unsold part of the estate to T. The deed contained a covenant by the plaintiff not to sell without giving six months' notice, and a covenant by T to pay the debt and interest; but there was no promise for redemption, as in a common mortgage. The money was not paid. The plaintiff alleging the property to be an insufficient security, afterwards filed his Bill against the parties claiming under T, who was dead, for a sale of the property, and for payment out of the produce of the principal, interest and costs. Mr. Kinglake's argument there is worthy of consideration:—"The plaintiffs are entitled to the ordinary decree for redemption, and not to a sale. The transaction though peculiar in form is a mere Welsh mortgage with a superadded power of sale, for the estate is conveyed to the plaintiff in fee, in trust, if default be made out of the rents and profits or by a sale to pay the debt. The deed contains all the usual elements of a mortgage security, there is a covenant to pay, and on payment the mortgagor would be entitled to a reconveyance; the proviso for reconveyance differs only in form from the ordinary reservation of an equity or a proviso for redemption, and if this be in effect a common mortgage, the mortgagor must have six months' time to redeem before the sale is made."

Nor can a mortgagee contract with the mortgagor, at the time of the loan, for the absolute purchase of the land at a specific sum, in case of default being made in the payment of the mortgage money at the appointed time. This was held in the old case of *Jenning* v. *Ward*.[2] The reason being that any agreement which clogs the equity of redemption is void. The rule, however, does not interfere, as has been already observed, with a purchase of the equity of redemption as a distinct and subsequent transaction.[3]

The right of redemption cannot be exercised before the time stipulated in the deed of mortgage, nor can a mortgagee compel a mortgagor to redeem before the stipulated time. As, on the one hand, equity preserves to the mortgagor the right of redemption, so, on the other, in justice to the creditor, it allows the latter to foreclose the mortgage under certain circumstances, that is to debar the mortgagor from ever afterwards calling for redemption. To foreclose a man is, as was observed in *Bonham* v. *Newcomb*,[4] to bar him of his equitable title, when the estate in law is become forfeited. Note that what is called the equitable title is the equity or right of redemption, or rather the mortgagor's estate in equity.

The time within which the mortgagor may redeem is thus laid down by

[1] 17 Beav, 11.
[2] 2 Vern, 520.
[3] Coote on Mortgage, 20.
[4] 1 Vern, 232, (1683)

Statute :[1] "Whenever a mortgagee has obtained possession of the land comprised in his mortgage, the mortgagor shall not bring a suit to redeem the mortgage but within twenty years next after the time when the mortgagee obtained possession, or next after any written acknowledgment of the title of the mortgagor, or of his right to redemption shall have been given to him or his agent, signed by the mortgagee." Under Stat. 15 and 16 Vict. c 76, ss. 219, 220, when the mortgagor is in possession, and an ejectment is brought by the mortgagee, provided no suit is pending in any Court of Equity for redemption or foreclosure, the payment of principal, interest and costs will, except in certain cases, be deemed a satisfaction of the mortgage. On the other hand, it is open to the mortgagor to bring a suit, or file a Bill of foreclosure within twenty years after the default of the mortgagor.[2]

Under the provisions of the Conveyancing and Law of Property Act,[3] a mortgagee, where the mortgage is made by deed, shall have the power to sell the property as if it had been in terms conferred by the mortgage deed, namely, "a power when the mortgage money has become due, to sell or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such condition respecting title or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to re-sell without being answerable for any loss occasioned thereby."[4] Moreover, "in any action, whether for foreclosure or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms."[5]

Note that there are two stages in a decree for foreclosure, and the form of the decree will vary according as the mortgagor is in possession, or the mortgagee is in possession. Where the mortgagor is in possession, the first decree directs an account to be taken of what is due to the creditor, plaintiff, for principal and interest and costs, and allows the debtor, defendant, six months' time to pay off

[1] 3 and 4 Will IV, c. 27, s. 28.

[2] 3 and 4 Will IV, c. 27, ss 24, 28.

[3] 44 and 45 Vict, c. 41.

[4] 44 and 45 Vict., s. 19.

[5] *Ibid*, s. 25, cl 2.

the principal, interest and costs, it then directs the plaintiff on such payment to re-convey the estate to the defendant: "but in default of the defendant paying to the plaintiff what shall be so certified to be due to him for such principal, interests and costs as aforesaid, by the time aforesaid, the defendant is from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said mortgaged hereditaments."[1] The second or final decree, declaring that the defendant had failed to pay the amount, orders that "the said defendant do from henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said mortgaged hereditaments."[2] The decree for foreclosure where the mortgagee is in possession embraces certain points which are worthy of consideration. It directs over and above the usual account of what is due to the plaintiff for principal, interest and costs, "an account of the rents and profits of the hereditaments comprised in the said mortgage received by the plaintiff or any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff might have been so received," and orders what shall appear to be due on such account of rents and profits to be deducted from what shall appear to be due to the plaintiff for principal, interest and costs: and in case of any repairs and lasting improvements made by the mortgagee, a further account of all sums of money laid out for such purpose with interest at the rate as the mortgage may carry to be added to the principal, interest and costs due by the mortgagor."[3] In a suit for redemption, the decree will direct the plaintiff, mortgagor, to pay to the mortgagee, defendant, whatever may be found due by the former upon the accounts within six calendar months, and, thereupon, order the mortgagee to re-convey the estate; but in default "let the plaintiff's Bill from thenceforth stand dismissed out of this Court with costs."[4] It will be seen that foreclosure follows default in payment under the decree.[5]

Formerly, upon a mortgage the mortgagee virtually became the owner, or *malik*, so to say, and the position of the mortgagor if in possession was scarcely better than that of a tenant at will in the view of the law. On default of payment of interest he was liable to be summarily ejected. A tenant claiming under a demise of whatever kind, made after the mortgage, without the privity of the mortgagee, is like his lessor, the mortgagor, liable to be ejected without notice.[6] Note the words of LORD MANSFIELD:[7] In *notion of law*, the mortgagor was only tenant at will, or, at most, from year to year; he had the lowest estate possible; in *equity* he was owner of the estate subject to the charge upon it; but he could

[1] 1 Seton on Decrees, 364.
[2] *Ibid*, 393.
[3] *Ibid*, 366, 367.
[4] *Ibid*, 461—462.
[5] *Dunstan* v. *Paterson*, 2 Ph., 341
[6] *Rogers* v. *Humphreys*, 4 A. and E. 299.
[7] 2 Doug, 720, (1781).

do nothing to weaken the security." Now, under the Conveyancing and Law of Property Act,[1] a mortgagor of land while in possession shall, as against every incumbrance, have by virtue of the Act, power to make from time to time under certain limitations, an agricultural or occupation lease for any term not exceeding twenty-one years, and a building lease for any term not exceeding ninety-nine years.[2] And so may a mortgagee in possession in like manner. Although, however, the mortgagor in possession is in equity the owner of the estate, and therefore not liable to account to the mortgagee, yet he is accountable to the mortgagee for waste, and will be restrained by injunction if the security be insufficient or is likely to be rendered insufficient or scanty by the acts of waste imputed to him. In *King* v. *Smith*,[3] WIGRAM. V. C. observes: "I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into." At the same time, a mortgagee in possession may not commit waste with a sufficient security. He is bound to keep the estate in necessary repairs, and take such care of it, of course with some limitation, as a prudent owner would do of his own estate.[4] "A mortgagee in possession," observes LORD ST. LEONARDS, "should keep regular accounts, for he is liable to account to the mortgagor for the profits which he has, or might have received without fraud or wilful neglect: he is answerable for wilful neglect, although not guilty of actual fraud; for instance, if the mortgagee turns out a sufficient tenant and having notice that the estate was under-let, takes a new tenant, another substantial person offering more: but in general, if the mortgagor knows that the estate is under-let, he ought to give notice of th circumstance to the mortgagee, and to afford his advice and aid for the purr of making the estate as productive as possible. A mortgagee in possession if necessary, appoint a bailiff and receiver, and charge the estate with salaries; but if he choose to take the trouble on himself, he cannot char not even, formerly, if the mortgagor agreed to make him any allowance would have been to give him something beyond his principal and interest, now such an agreement would probably be held to be binding: the mortgagee cannot justify committing waste on the estate unless the security is defective, and in that case the waste must be in its nature productive of money, which

[1] 44 and 45 Vict., c. 41.

[2] *Ibid*, s 18.

[3] 2 Hare, 244.

[4] Fisher on Mortgage, Vol. 2, 886. "And it has been said that he ought not to be charged with the same degree of care which a man is supposed to take who keeps possession of his own property."

must be applied in relief of the estate; nor can he enter upon any speculation at the risk of the mortgagor; therefore if he open a mine or quarry, he must do it at his own risk, and yet the profit from it would be brought into the account against him: he need only keep the estate in necessary repair, and of course he can repay himself out of the rent; and if he increase the interest in the estate, as by renewing the lives where the estate is held upon lives, he will be entitled to be repaid the sum advanced, with interest, which will be considered as an additional charge on the estate."[1]

In *Perry* v. *Walker*,[2] a leasehold property was mortgaged. When the mortgagee took possession the buildings on the premises were mere carcases. Under the mortgage, the mortgagee was enabled to repay himself whatever he should expend in repairs of the property included in the leases. It appeared that the mortgagee could at a moderate expense have converted the carcases into houses fit for letting. The mortgagee made no attempt to sell the carcases under the power of sale, nor did he take any steps towards completing them, and rendering them fit for letting or habitation, but he abandoned the property. The result was that the lessor took advantage of the clauses of forfeiture contained in the leases, and resumed possession of the property. VICE-CHANCELLOR STUART there said: "The defendant (mortgagee) took possession under the usual responsibilities of a mortgagee to preserve the property; it could not be a proper mode of dealing with the property to allow the leases to be forfeited without any effort to sell. The defendant, as mortgagee in possession, would have been justified in performing any of the covenants, or in doing any of the acts, which the plaintiff (lessee) might or could have done. There was no principle of this Court that a mortgagee entering into possession of a leasehold was not bound to fulfil the covenants of the lease. A mortgagee in possession bound to act as a provident owner. It would have been the act of a provi- person to have completed these houses, or, at all events, to have sold

the case of *Sandon* v. *Hooper*.[3] There the law is fully explained, in how far a mortgagee in possession is entitled to be reimbursed for xpenses of repairs and lasting improvements, by LANGDALE, M. R.: "The xt question is whether the plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times, shewing what he ought, and to some considerable extent, what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the

[1] Handy Book, 116—117. [2] 1 Jurist N., S. 746, (1855). [3] 6 Beav., 248, (1843).

title of the mortgagor. Further, if he has got the consent of the mortgagor, or has given him notice, in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property; but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed, *improving a mortgagor out of his estate*—an expression which has been used both in this argument, and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property."

It is also important to observe that a mortgagee in possession is precluded from deriving any profit by charging for his trouble though his services may have benefited the estate. The case of *Leith* v. *Irvine*,[1] not only explains the reason of the rule; but also points to the difficulty which had from time to time occurred to learned Judges in their endeavour to fix the mortgagee in possession with the character of a trustee. "LORD HARDWICKE said in *French* v. *Baron*," proceeds LORD BROUGHAM, "that an agreement between mortgagor and mortgagee that the latter should have an allowance as receiver, would not be carried into execution by the Court; the same learned Judge in *Godfrey* v. *Watson* distinctly stated the rule of the Court to be that where a receiver or bailiff was required, the mortgagee in possession might employ him, and debit the estate with what was necessary to pay him, but could not credit himself with such payments for his own trouble if he chose to do the business himself. This has been at other times expressed by saying that the mortgagee in possession is a bailiff without a salary, accountable to the mortgagor, but not paid by him." After hinting that one of the grounds for the doctrine was that the allowance of such stipulation or such charges opened a door to usury, the learned Judge went on "but there is another ground; the mortgagee, by taking possession changes the relation in which he stands to the estate; he becomes *quasi* owner. He is in some sort likened to a trustee; not that he can with any correctness of speech be called a trustee. In truth, till the debt is paid off, the mortgagee in possession cannot be considered at all as a trustee. Nevertheless, all the authorities place him in the same predicament with a trustee as far as incapacity to charge for trouble is concerned. Thus LORD KEEPER NORTH observes "where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care or pains." and LORD ELDON was so much impressed with the similarity of their situations in some respects, that both in *Chambers* v. *Goldwin* and *Cholomondeley* v. *Clinton*,

[1] 1 My. and K. 277, (1833).

while he refers to that resemblance, he seems hardly to think himself safe in considering them to be different In the former case he speaks of "the trust if it is a trust;" and in the latter he more than once says, "not strictly a trustee," and contrasts a mortgagee with what he terms "a strict trustee." A mortgagee may be, either before default, a tenant in mortgage, or after default and before possession, a mere creditor having a lien upon the estate, and being entitled to take possession; or he may be, after possession and before payment of his debt a *quasi* owner, and holding the estate for his own purpose of working out his own satisfaction; or he may be in, after payment of the debt, and then he is a mere trustee. When the creditor has reached the third stage, that of having taken possession of his mortgage, he abandons the position he before held, of a mere creditor having a lien upon the estate for his principal and interest, and having a right at any time better to secure his satisfaction, by putting himself in his debtor's shoes. So long as he stood thus, there was nothing inconsistent in his being employed for a certain reward in the management of the estate, and provided he did not make that employment a condition of forbearing the demand of his debt, there was nothing to prevent him from taking that reward. But when once he takes possession, he assumes a different character; all he does is for himself, and he is not at liberty to charge the mortgagor, whom he has ousted, with the trouble which he takes on his own account. Such a proceeding would be like making a charge against himself; it would open a door to imposition, and even oppression; the owner would have no security against over-charges on the part of the possessor, who is not a trustee for the owner in the ordinary sense of the term, but is placed in the situation of having the owner's interest, of necessity, very much confided to his care. The owner must needs rely upon the mortgagee in possession, because he has no right to interfere with the operations of the latter, unless some act be committed which calls for the interference of the Court. As long as the necessity for employing a person as bailiff, receiver, or consignee is plainly substantiated; and further as long as the person so employed is an individual distinct from the mortgagee who retains and pays him, so long there is some check upon imposition; and the mortgagor at whose expense this is done, may be considered as tolerably safe. But were the mortgagee, in his almost uncontrolled management, to have the power, as it were, of hiring himself, the check, such as it is, would be entirely removed."

Note that any sum of money *bonâ fide* expended upon improvements is regarded as an additional charge on the premises.[1] Although a mortgagee in possession is bound to preserve the property and maintain it in necessary repairs,

[1] In the matter of Cunnington, 3 Montague and Ayrton's Rep., 63.

he is not bound to keep up buildings in as good repair as he found them, if the length of time will account for their being worse.[1]

Observe that the mortgagor must redeem the whole of the property or not at all. In other words, he cannot insist upon redeeming a portion of the mortgaged property by a payment of a proportionate part of the debt. "It is a settled rule," says the Vice-Chancellor in *Bugden* v. *Bignold*,[2] "that a mortgage cannot be redeemed by parcels." In *Watts* v. *Symes*, LORD CRANWORTH said: "I thought it quite settled that whether the suit was for foreclosure or redemption, the mortgagee was equally entitled to say to the mortgagor, you must redeem entirely or not at all. That is the general rule."[3]

Note, also, that any accession or accretion to the mortgaged property is considered to be a part of the property with reference to the mutual rights of the mortgagor and the mortgagee. This is an old doctrine of English law. In *Gibbons* v. *Pott*,[4] a lord of a manor mortgaged the manor in fee and afterwards purchased copyholds held of the manor, and took surrenders of them to himself in fee. LORD MANSFIELD, there, held that the copyholds should enure to the benefit of the mortgagee.

The priority among mortgagees is according to the dates of their respective contract, and is founded upon the doctrine of *qui prior est tempore, potior est jure*, that is, prior in time more capable in law. In *Jones* v. *Jones*,[5] A mortgaged an estate first to B, secondly to C and thirdly to D, by virtue of a power reserved to him by his marriage settlement. C had no notice of the first mortgage. D had notice of the first, but not of the second, and he caused a notice of his mortgage to be indorsed on the settlement, which together with the title deeds, was in possession of B. It was held that D did not thereby gain priority over C. SHADWELL, V. C. there observed:—"At law the rule clearly is that different conveyances of the same tenement, take effect according to their priorities in time. If a man seised in fee, first grants one term of years and then another term, the second term or cannot enter till the first term has ceased by effluxion of time, surrender or otherwise. So, if freehold interests are carved out of the fee by different conveyances, the estate of the second grantor cannot take effect in possession, till the estate of the first has, in some measure, ceased. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession and then in remainder. Equity follows the law: and where the legal estate is outstanding, conveyances of the equitable interest, are construed and treated, in a Court of Equity, in the same manner as conveyances of the legal estate are construed and treated at law. In *Beckell* v *Cordley* (1 Bro.

[1] 1 Anstruther's Rep. 96, (1792)

[2] 2 Younge and Collyer. 394, (1843).

[3] 1 De Gex. M. and G. 236, (1851).

[4] 2 Douglas 710, (1781).

[5] 8 Simon's Rep 633, (1837).

c. c. 353,) which LORD ELDON notices in Exparte Cawthorne (1 Glyn. and Jam. 240) and in *Martinex* v. *Cooper* (2 Russ. 214) LORD THURLOW twice decided that, where the legal estate was outstanding in a first mortgagee, of two subsequent equitable incumbrancers, he who is prior in time, must be prior in equity. His words are: "The second equitable incumbrancer had the security he trusted to. He knew he had not the legal estate. He trusted to the honour of the borrower." In the present case no such question arises as is noticed in *Willoughby* v. *Willoughby* (1 T. R. 763—772) or as is noticed in *Evans* v. *Bicknell* (6 Ves. 174—183) where LORD ELDON alludes to what fell from Mr. J. Buller in *Goodtitle* v. *Morgan* (1 T. R. 762): for Harris, the third incumbrancer, has not got in the legal estate, nor has he any declaration of trust from the holder of it, nor has he possession of the mortgage deeds conveying the legal estate or of any other of the title-deeds. He gave notice of his incumbrance to the first mortgagee. But according to what the present LORD CHANCELLOR decided in *Peacock* v. *Burt*, such a notice is of no value."

It is needless to say that fraud, or negligence so gross as to amount to fraud, on the part of the prior mortgagee, or active co-operation on his part to conceal the fact from, and thereby to mislead, a subsequent mortgagee of the same property will postpone the former to the latter. In *Evans* v. *Bicknell*,[1] it was said "that there must be positive fraud or concealment, or negligence so gross as to amount to fraud, in order to postpone a prior mortgagee to a subsequent one." In *Plumb* v. *Fluitt*, Chief Baron Eyre observes: "I find no case that goes the length of saying that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee as if he were guilty of fraud or wilful neglect."[2]

Note an old case, *Peter* v. *Russel*,[3] commonly known as the case of the Thatched House Tavern. LORD ELDON refers to that case in these words[4]:— "It is not to be denied that where there has been mere negligence, though it may have very mischievous consequences, the Court has not charged the party, unless it has been so gross as to amount to evidence of fraud. The case of the *Thatched House Tavern* was very strong: the mortgagor desiring to have the deeds represented to the mortgagee that he was about to make additional buildings; which would improve his security. The purpose of delivering the deeds was innocent; but it gave the other the complete power of executing the fraudulent purpose. Having got the title-deeds he makes a mortgage; and then contrived to get the lease back from the second mortgagee and restored it to the first; but the negligence did not rest upon that only: the mortgagor applied a second time to the first mortgagee, and under another pretence got the deeds

[1] 6 Ves, 191.
[2] 2 Anstruther's Rep. 440, (1721).
[3] 1 Eq Ca Ab, 321.
[4] 6 Ves, 190.

back again; which enabled him a second time to cheat third persons, and he made a third mortgage. The circumstance of his parting with them again was strong. Then the question arose upon these mortgages, whether the first should not be postponed to the second and third; but the Court thought there must be some concurrence in a fraudulent purpose, and the purpose held out disclosed nothing of fraud. If negligence alone were sufficient, it ought to have had the effect in that case: but the Court said, the first mortgagee had done nothing unconscientious; and did not conceive themselves entitled to relieve the subsequent mortgagees. * * * If then the cases go to this only, that there must be positive fraud or concealment, or negligence so gross as to amount to fraud, is there in this case evidence, resting upon that high degree of probability, upon which the Court, guided by its conscience must act, that this trustee had a fraudulent purpose: if not, is there negligence so gross as to amount to constructive fraud, as Chief Justice Eyre expresses it in *Plumb* v. *Fluitt;* such evidence of fraud, that he shall not be heard in a Court of Justice to say, there was not fraud.?"

In *Tourle* against *Rand*, the LORD CHANCELLOR "did not conceive that a first mortgagee's not taking the deeds was alone sufficient to postpone him; if it were so there could be no such thing as a mortgage of a reversion. In that case the deed being in the hands of the tenant for life; is not sufficient to turn him round. The first cases where the prior mortgagee was postponed were cases of fraud; then, the same was done in cases of gross negligence"[1] Observe the Reporter's note to the case: "*The doctrine in the case is good law;* and it is quite settled *that* there must be utter *fraud, concealment* or *such gross negligence as may be presumed to have originated in a fraudulent intention,* to postpone a party, under the mere circumstance of his not obtaining possession of title deeds, even where his security is not upon a mere reversion: though Mr. Justice Buller had authority, for his assertions in *Goodtitle* v. *Morgan*, it is clear he was mistaken in point of sound law, and his positions have been expressly overruled."

Note, also, the distinction that is made between a mortgage, and a conveyance with a condition of re-conveyance by the purchaser in the event of the purchase money being paid to the buyer on a certain day. In the latter case, the condition must be strictly carried out, and time will be regarded as the essence of the contract. "Where a condition," as was said in *Pegg* v. *Wisden*[2] "is necessary to be performed by one to entitle him to become a purchaser, it must be strictly performed." If A conveyed an estate to B in consideration of a certain sum of money, and by a deed of even date B contracted that if A should desire to repurchase the estate, and pay to B on a particular day the said sum of money, B would re-convey the estate to A for that sum; in such a case, a question would arise whether the parties intended the transaction to be a

[1] 2 Brown's Rep, 650--651, (1789). [2] 16 Beav, 239.

mortgage or sale out and out with a condition of repurchase. It has been said in several cases, that where a *bonâ fide* sale is accompanied by a power to repurchase, this will not make the transaction a mortgage, if such does not appear to have been the intention of the parties. "The best general test of such intention is the existence or non-existence of a power in the original purchaser to recover the sum named as the price of such repurchase: if there is no such power there is no mortgage."[1]

In *Alderson* v. *White*,[2] LORD CRANWORTH observed: "The question is in this case, whether the transaction was a mortgage or not. The first of the deeds then executed purports to be an absolute conveyance. By the deed of even date, it was stipulated, that if Newman should be desirous of repurchasing the estate, he should be at liberty to do so on the terms therein mentioned. These deeds taken together do not on the face of them, constitute a mortgage, and the only question is, whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense; that *primâ facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instrument? Here the first instrument was, on the face of it, an absolute conveyance; the second gave a right to repurchase on payment not of what should be due, but of the full amount of the purchase money. Was that, if taken according to its terms, a lawful contract? Clearly so. What, then, is there to show that it was intended to be a mere mortgage?" It was argued in the case, that the transaction, if treated as a purchase, was a case of a most oppressive bargain; and it appears from the judgment that the Courts would be inclined to give relief in special cases if the bargain happened to be so grossly oppressive as to enable the Courts to presume that the intention of the parties was, that the transaction should be one of mortgage.

On the subject of mortgage there is another point to which it is particularly necessary to advert. That point consists in the extension of the principle of "*suum cuique tribuere*" of the Roman Jurists,[3] in other words, the principle of "disappoint none, give to each creditor as far as possible what is his due."

[1] 4 Beav., 197, 203, 2 De G and J 97, 17 Beav., 11, 19 Ves., 413.

[2] 2 De Gex and J. 105, (1858)

[3] "Juris præcepta sunt haec honeste vivere, alterum non lædere, suum cuique tribuere," that is to say, these are the precepts of jurisprudence, namely, to live honestly, to injure no one, to give to each his due. J. Int. Lib 1 Tit. 1, 3.

Equity secures this object by what is called the process of marshalling. For instance, where one creditor has a lien or security upon two funds, and another creditor has a security only upon one of those funds, equity will generally restrain the creditor having two funds from resorting to the fund which is the only resource of another creditor. It has thus been held that if the owner of two estates mortgage them both to one person, and then one of them to another *without notice*, the puisné or the subsequent mortgagee may insist upon the doctrine of marshalling, that is, that the debt of the first shall be satisfied out of the estate not mortgaged to the second; but then there is a limitation, for equity will refuse to marshall securities where in aiding one incumbrancer it would injure another. In *Lanoy* v. *The Duke of Athol*,[1] LORD HARDWICKE thus lays down:—"The Duchess has two funds, real and personal assets, to answer her demands; the plaintiff has only one; is it not then the constant equity of this Court, that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien: suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Courts in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee even though the estates descended to two different persons." Upon this authority was founded the case of *Gibson* v. *Seagrim*.[2] There two properties X and Y were mortgaged to A, and afterwards X alone was mortgaged to B, and it was *Held* that B was entitled to have the securities marshalled, so as to throw A's mortgage, in the first instance, on estate Y.

Note, also, the observation of LORD ELDON in *Aldrich* v. *Cooper*:[3] "The Court has said and the principle is repeated very distinctly in *Attorney General* v *Tyndall* (Amb. 614) that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds, shall take to that, which, paying him, will leave another fund for another creditor: Suppose another case:—Two estates mortgaged to A; and one of them mortgaged to B. He has no claim upon the deed on the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person having two funds shall not, by his election, disappoint the party having only one fund; and equity to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund, to which the other has access, may remain clear to him." In *Baldwin* v. *Belcher*,[4] SIR E. SUGDEN states that "the rule of law is perfectly settled. If there are two creditors who have taken securities for their

[1] 2 Atk, 446, (1742).

[2] 20 Beav, 614, (1855).

[3] 8 Ves., 391, (1803).

[4] 3 Drury v. Warren 176, (1842)

respective debts, and the security of the first creditor ranges over two funds, while the security of the other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person, who has two funds liable to his demand, on that which is not liable to the debt of the second creditor."

As has been already observed there will be no marshalling where one of the creditors is likely to be prejudiced. This point was considered in *Barnes* v. *Racster*:[1] There Racster, being seised of Foxhall Coppice and a piece of land No. 32, mortgaged in 1792 Foxhall to Barnes, in 1795 Foxhall to Hartwright, in 1800 Foxhall and No. 32 to Barnes, and in 1804 Foxhall and No. 32 to Williams. VICE-CHANCELLOR KNIGHT BRUCE there observed: "All the mortgages cannot be paid in full. Foxhall alone is not sufficient to pay the first charge upon it, but No. 32, without Foxhall, is sufficient to pay the whole of Barnes' demands. Hartwright, therefore, claims to throw Barnes on No. 32 exclusively. To this Barnes is indifferent; but Williams objects, contending that as he is an incumbrancer for value, the burthen of the first mortgage ought to be borne at least rateably by Foxhall and No. 32, upon which latter Hartwright never took a charge. This is the question to be decided. * * Circumstanced as the present case is, Hartwright and Williams stand with regard to the matter in dispute on an equal footing; that Barnes must be paid out of the respective proceeds of No. 32 and Foxhall, *pari passu*, and rateably according to their amounts; that the residue of the produce of Foxhall must be applied towards paying Hartwright, and that the residue of the produce of No. 32 must be applied towards paying Williams;—a conclusion, is I consider, entirely in accordance with the principles on which *Lanoy* v. *Duchess* of *Athol* and *Aldrich* v. *Cooper* were decided." Thus if estates X and Y be mortgaged first to A and secondly X be mortgaged to B, and thirdly Y to C, or if X be mortgaged to A, secondly to B, and thirdly X and Y again to A, to secure the original debt and a further advance, and fourthly X and Y to C: here in either case A may resort for his whole debt either to X or Y. Now, if A be compelled to take his debt exclusively from Y, X will be left free for B, but at the expense of C. But this would clearly be inequitable; for even if C had notice when he took his security, he had notice of no more than that A had a security upon Y; and he ought not to lose the benefit of his contract in favour of B, who claims under no contract against that estate. B having lent his money on estate X only, and having taken no charge upon or covenant respecting Y, has no more than a potential equity, as it has been called against that estate, which by means of the subsequent security given to C was prevented from fully arising. He has no equity to prevent the mortgagor from pledging estate Y to C; none to

[1] 1 Younge and Collyers 403, (1842).

prevent A from giving up his security upon it, and so depriving B even of his chance of getting a title by redeeming A. The only equity which he has is in respect of so much as the mortgagor had not alienated for value. Yet if in such a case, he cannot refuse all intereference, lest C the third incumbrancer should lose his security, it would expose B the mesne mortgagee, to the like injury; for if A were left to take his whole debt out of estate X, the second mortgagee, B, would lose his security; whilst to the third, C, who has no better equity, and is later in time, estate Y would be left open. Therefore in ordinary cases the Court will throw the debt of A upon both his securities rateably according to their value, and so will leave the residue of each to satisfy the subsequent incumbrancer, to whom it was specifically mortgaged."[1]

Note that writing is necessary to the validity of a contract of mortgage. As early as the reign of Charles the Second, it was enacted by the Statute of Frauds[2] that "no action must be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, unless the agreement or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized." A departure was apparently made from the rule in the case of what is now well-known as equitable mortgage. So far as I have been able to ascertain the first recognition of a mortgage without writing, or equitable mortgage by deposit of title deeds took place in *Russel* v. *Russel*.[3] That case was decided in the year 1783. There, a lease having been pledged by a person as a security for a sum of money lent to another, the pledgee brought a Bill for a sale of leasehold estate. The pledge was effected without writing. It was argued on behalf of the plaintiff that he had a lien upon the estate; whilst it was contended, on the other hand, that the plaintiff's claim was against the law of the land, "for that it would be charging land without writing which was against the 4th clause of the Statute of Frauds. Upon this, LORD LOUGHBOROUGH observed:—"In this case it is a delivery of the title to the plaintiff for a valuable consideration, the Court has nothing to do but to supply the legal formalities." It appears from the Reporter's note to this case that before this the point was much doubted; but that the same point was afterwards determined in the case of *Featherstone* v. *Fenwick* in 1785, and *Harford* v. *Carpenter* in 1785, where LORD THURLOW held that the deposit of deeds entitled the holder to have a mortgage, and have his lien effectuated, although there was no special agreement to assign."

In *Plumb* v. *Fluitt*,[4] the words of EYRE, C. B. are to this effect:—"It is now fully settled that a deposit of title deeds, as a security for a debt, does amount to an equitable mortgage; if the plaintiff can prove actual or construc-

[1] Fisher on Mortgage, 761.

[2] 29 Car. 2, c. 3.

[3] 1 Bro C. C. 269

[4] 2 Anstruther's Rep. 432, (1791).

tive notice of the deposit in the defendant, it raises a trust in him to the amount of that equitable mortgage." Note the remark in *Hankey* v. *Vernon*:[1] "It certainly has always been held in this Court that the deposit of title-deeds as a security is an equitable mortgage."

There is abundant evidence, however, that the Courts of Equity gave their sanction to equitable mortgages with reluctance, and it was not without some struggle that the rule was established. For this we have the words of LORD ELDON in *Exparte* Mountfort.[2] "I venture," observes that great Judge, "the first determination, establishing a mortgage by a deposit of title-deeds, which surprised the Bar considerably; and that feeling has been justified by every subsequent case upon the point: the mischief of all these cases is, that we are deciding upon parol evidence with regard to an interest in land within the Statute of Frauds."

The same learned Judge in *Exparte* Kensington[3] states the rule of equitable mortgage as well established. This was in the year 1813. These are his words: "It has been so long settled, that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage; that whatever I might have thought originally, I must act upon that as settled law, as judicial decisions are to be found that a lien upon deeds may exist without giving any right at law to the estate."

In conclusion, I wish to draw your attention to the words of LORD WESTBURY as to the liability of a mortgagee in possession for wilful default. In *Parkinson* v. *Hanbury*,[4] the LORD CHANCELLOR observes:—"It is undoubtedly settled in the Courts of Equity, that if a mortgagee in that character enters into receipts of the rents and profits, he will be bound to account, not only for what he has received, but for what, without wilful default, he might have received: it is difficult perhaps to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a Court of Equity as the bailiff of the mortgagor; now an account against a bailiff was, both at common law and in equity, given with wilful default: that is almost the only case, save in cases of fraud, or breach of trust, where wilful default is infused into the form of the account; and if the mortgagee is regarded as in the nature of a bailiff to the mortgagor, then it would be proper to give the decree against him, as it is always done against a bailiff with wilful default."

In British India, the law is, and has practically been, on the same lines as in England. I need not repeat that in British India a distinction arose from

[1] 2 Cox. 14, (1788).
[2] 14 Ves. 606, (1808).
[3] 2 Ves. and Beames, 337.
[4] L. R., 2 App. Cases, 15 (1867).

about the very commencement of British rule between what were called the Presidency Towns and the Mofussil. In the Presidency Towns the law that was administered was virtually the English law, with a few exceptions here and there; whereas in the Mofussil the established usages of the people were observed as much as possible in the administration of justice, tempered in a variety of cases by the principle of equity and good conscience. The principle of equity and good conscience, it should be noted, was not unfrequently the rule of English law. Observe what was said in Varden Seth Sam's case:[1] "It is not shown that any local law, any *lex loci rei sitæ*, exists forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made, that is the English law, the deposit of title-deeds would create a lien on lands." Equitable mortgage by deposit of title-deeds was clearly recognized by their Lordships of the Privy Council in the foregoing case in Mofussil India.

Under the Transfer of Property Act, all mortgages relating to immoveable property of whatever value are required to be made by writing and attested by witnesses, and in the case of immoveable of the value of one hundred rupees or upwards, registration is further compulsory. "The requirement of registration," in the opinion of the Law Commission, "will not only discourage fraud and facilitate investigation of title, it will also preclude some difficult questions as to priority." Section 59 of the Act is in these words: "Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses; where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

It will be seen at once that an equitable mortgage by the mere deposit of title-deeds violates the whole principle of the section. Such a mortgage is at variance with the policy of the Registration law, whose aim is to make the system of transfer of immoveable property as far as possible a system of public transfer, and even dispenses with a written instrument. The authors of the Act, it would appear, have reluctantly provided for such a mortgage, and confined its operation within the narrow limits of the Presidency and commercial towns. Note the exception to section 59: "Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon." Useful as these transactions sometimes are, for the secrecy which is their characteristic

[1] 9 Moo. I. Ap. 321, (1062.)

not unfrequently protects the credit of the debtor, they are likely to give rise to the tangled question of priority, notice, and matters between the equitable mortgagee and subsequent transferees. A difficulty arose in *Plumb* v. *Fluitt*,[1] the Court being of opinion that it was not absolutely necessary for a mortgagee to get the title-deeds.

There is a kind of mortgage which has been in common use in British India, and to which allusion has already been made, namely, *bye-bil-waffa* or mortgage by conditional sale, known among the "Hindu" population in Bengal as *kut-kobala*.

Apart from what the natives of the country might have thought of the nature and character of these transactions, it will be sufficient to observe that at first in all British India, and for a long time, except in the Bengal Presidency, the essential characteristic of a mortgage by conditional sale was that, on the breach of the condition, the mortgage foreclosed itself, or, in other words, the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them.[2] How this transaction of *bye-bil-waffa*, or rather the corresponding *drishta-bandhak* of Madras and the *gáhan láhan* of Bombay gradually came to be viewed as a mortgage with the English Equity of redemption in the Provinces of Madras and Bombay may be best summarised in the words of Mr. Mayne in his reply in 1875 in Thumbusawmy Moodelly's case.[3] Speaking of the Madras Presidency, he says: "With reference to these decisions it may be affirmed that they divide themselves in three stages. Down to the year 1858, the Courts construe deeds of conditional sale strictly, and, on default, give absolute ownership to the mortgagee. From 1858 to 1862, the decisions proceed on the view that a condition of forfeiture on default is a penalty not to be enforced. On this view the mortgagee under a conditional sale is placed on no better footing than the holder of a bond with whom land is pledged in security. From the year 1862, the Courts have applied the English equitable doctrine of time not being of the essence of the contract." In respect of the Bombay Presidency, the learned Counsel proceeded to say: "The strict construction of mortgages by conditional sale was continued in Bombay down to the year 1864, when the course of decision was changed by the judgment in *Ramji* v. *Chinto*."[4]

It should be noted that but for the unusual delay which arose in the decision of Pattabhiramier's case, certainly in Madras, and probably in Bombay, the strict construction of mortgages by conditional sale would perhaps have been the rule up to the passage of the Transfer of Property Act. The obser-

[1] 2 Anstruther's Rep, 432, (1791).

[2] I. L. R. 1 Mad, 16.

[3] I. L. R. 1 Mad., 13

[4] 1 Bom. H. C. R. (A. C.), 199.

vations of SIR JAMES COLVILLE in Thambusawmy Moodelly's case,[1] are for more than one reason well worthy of consideration. "The passage of the judgment," proceeds that learned Judge, "in the case of *Pattabhiramie* v. *Vancatarow Naicken*, which seems to have led the Courts of India, in some of the cases which will be afterwards cited, to the belief that it had not that binding force upon them which an unqualified ruling of this tribunal of ultimate resort would unquestionably possess, is in these words: "It must not then be supposed that, in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded there."[2] In order, then, to see how far this reservation, taken in its fullest sense, can qualify the effect of the judgment, it is necessary to consider what has been the course of decision upon mortgages by conditional sale in the Courts of Madras. Mr. Mayne has shown that up to 1858 the decisions of the late Sudder Court of Madras were, with one exception, perfectly consistent with that of this Board in Pattabhiramier's case.[3] Indeed this is almost admitted in the judgment of the High Court of Madras of the 11th of December, 1871, which will be afterwards referred to. But in 1858 the current of decision seems suddenly to have turned. In the case No. 49 of 1858, decided on the 28th of August in that year (Madras Sudder Adawlut Decisions for 1858, p. 142), the Judges said:—"The Court observes that the transaction was a loan of money on the security of certain property, and that the established practice of the Courts of Equity in England is to recognize in the mortgagor a right of redemption, notwithstanding that the time stipulated for foreclosure may have passed by, and they do so on the ground that the repayment to the mortgagee of the money lent by him, with interest, is an equitable discharge of his claims. The Court of Sudder Adawlut recognizes the justice of this principle. They remark that there is an obvious distinction between a conditional sale with power to redeem and a mortgage. The parties in the first instance fix a value on the property, and the transaction is a true arrangement for the sale thereof for such consideration. In the latter instance, a sum is borrowed not representing the value of the property, and it may be far within such value, the only care being that the property shall be of such value as will cover the loan by way of security. It is therefore strictly equitable that, on the failure to pay off the loan by the time stipulated, the lender should fall back upon the security, not to absorb the whole, but to take his meney out of it. The clause of forfeiture in a mortgage deed the Court views as introduced *in terrorem*, by way of a penalty, and it is not the practice of the Court of Equity to enforce penalties. They merely accord to the

[1] I. L R 1 Mad., 18-23, (1875).

[2] 7 B L R, 136, S. C. 13 Moore's I. A., 560.

[3] 13 Moore's I. A., 572.

several parties their just and equitable rights, ascertained on consideration of the value that has passed from the one to the other, and which has to be recovered back. It appears, then, that the Judges of the late Sudder Court in 1858 took upon themselves, in contravention of the law of India, as declared and enforced by the decisions of their predecessors, to apply to this class of security for the first time the principles which the English Courts of Equity have for centuries applied to mortgages in this country. It would seem, however, that they did not adopt those principles in their integrity, since they treated the stipulation in favour of the mortgagee as a mere penalty, and made no provision for his getting the benefit of it by the machinery of a foreclosure suit. They apparently contemplated no remedy against the mortgaged property but that of sale. This case was followed by the late Sudder Court, notwithstanding the vigorous and well reasoned protest of one of its Judges (Mr. Morehead), which is to be found at page 150 of the S. A. D. for 1849, in three cases decided in 1859, and in three more, of which one was the very case of Pattabhiramier, decided in 1860. And so the course of decision in the Courts of Madras stood when special leave to appeal was granted in Pattabhiramier's case by this Board in April, 1861. Now, if that appeal had been prosecuted without delay, and those who constituted the Committee that heard it had before them all the cases in favour of the decree which had then been decided in the Madras Court, their Lordships believe that the Committee would nevertheless have allowed the appeal, and, so far from treating those cases as establishing a course of practice inconsistent with that which had previously prevailed, would have overruled them as decided on erroneous principles. It unfortunately happened, however, that the appeal slept for nine years, and that in the interval the Sudder Court, and afterwards the High Court which succeeded it, continued the course of decision which the former had begun in 1858. This appears by the judgment of the High Court in 1 Madras, H. C. R., p. 460; 2 Madras, H. C. R., 420; and 7 Madras, H. C. R, p. 6. In the first of these cases, Chief Justice Scotland recognized the mortgagee's right to a decree for foreclosure, which does not seem to have been admitted by the earlier decrees. In the second, the Judges treated the law as settled in almost absolute conformity with that administered by the Court of Chancery; observing, however, that in India, as in England, there may be sales with a condition for re-purchase within a fixed time, against the breach of which equity will not relieve. On this point they said, "it is the intention of the parties which governs, and that intention may be shown by the deed itself, by other instruments, or even by oral evidence." In the last case the Judges held, that the security in question was one of the latter class, and accordingly gave effect to it according to its strict tenour. But, in giving their judgment, which was delivered late in December, 1871, they took occasion to say, of the case in the 13th Moore's Indian Appeals :—"If we were bound by a case recently decided in the

Privy Council, the appellant must necessarily succeed, for the Judicial Committee observe that there has been no course of decision in Madras admitting of relief after the time. They base their judgment upon this, and intimate that it would have been the way if the fact were otherwise. It is otherwise, for the decisions of the Sudder Court since 1858 have carried the doctrine so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule which the Sudder Court intended to follow, and have held the question to be one of construction, admitting, however, for the purposes of the construction, other documents, and oral evidence."[1] A similar alteration by judicial decisions of the antecedent law seems to have been effected at Bombay, though at a later period. In the case of *Shankarabhai* v. *Kassibhai Vithalbhai*,[2] WESTROPP, C. J. reviews the law and its changes both at Madras and Bombay. He states that the change in the latter Presidency dates only from 1864, when the case of *Ramji* v. *Chinto*,[3] was decided. And the Chief Justice observes :—" The recognition of the right to redeem was, having regard to the previous decisions of the Sudder Adawlut, perhaps somewnat a strong measure. It had, however, for a long time previously, been considered a desirable course to adopt, and eminent Jndges of the High Court, who had formerly been Judges of the Sudder Adawlut regretted that their predecessors had, for the most part, enforced the conditions for purchase in *gahan lahan* mortgages, as such a course had been found to promote most oppressive and grasping conduct on the part of money-lenders in the Mofussil "[4] It would be difficult to have a more candid admission of the assumption by the Courts of the functions of the Legislature. This case also shows that the Bombay as well as the Madras Court has come to the conclusion that the modern course of decision is to prevail against that of this Committee in Pattabhiramier's case. The next case reported in this volume, *Krishnaji* v. *Ramji Sadashiv*,[5] rules that the right of redemption subsists, and will be enforced, although any number of years may have elapsed since the mortgagee's title, under the terms of the deed, would have become absolute, unless the right of redemption is barred by the 15th clause and section 1 of the Limitation Act, XIV. It appears to their Lordships that this action of the Courts of the minor Presidencies is open to grave objection; not only because in so altering the existing law they usurped the functions of the Legislature, but also because the change, as effected, involved very mischievous consequences. Under the law as

[1] 7 Mad. H. C. R , 12.

[2] 9 Bom H. C. R., 69.

[3] 9 Bom. H. C. R., (A. C.] 199. See, also, Ramshet Bachaset v. Pandhari Nath, 8 Bom. ; H. C R , p 236.

[4] 9 Bom. H. C R., 72

[5] 9 Bom. H C R. 79.

laid down by them, persons who fifty years before had acquired, as the law then stood, an indifeasible title into lands, which they had ever since held and enjoyed *in optima fide*, became liable to be dispossessed, and compelled to account for mesne profits at the suit of the representatives of a mortgagor against whom the sixty years' rule of limitation had not yet run. Nor is this an imaginary case. In the latest decision cited at the Bar, *Samathul*, v. *Kammatchi Amma Boi Saib*,[1] the mortgage deed was executed in 1811, the title of the mortgagee became absolute in 1816; there had been since 1811, uninterrupted possession by him, or by a purchaser for him; and the suit to redeem must have been brought but just within the sixty years' period of limitation. The Reports show that other instances of similar disturbance of title have occurred, and more may occur. Again, the distinction between sales with a condition for repurchase, and mortgages by a conditional sale, is made to depend upon the intention of the parties to the orignal transaction proveable, if need be, by oral evidence. This seems to open a wide field of litigation, and to leave much to the discretion of the Judge in each particular case; and the inquiry is embarrassed by the circumstance that the parties whose intention is to be ascertained cannot, in the case of an ancient transaction, have contracted with reference to a state of law which the Courts of Madras have decided no longer exists. In Bengal, where the possible mischiefs that might result from having mortgages by conditional sale to take effect according to their tenour early became apparent, the Legislature proceeded on sound principles to apply a remedy. By Regulation I of 1798 it gave the mortgagor the means of avoiding any dispute as to tender, and of keeping alive his right of redemption by a payment into Court. By Regulation XVII of 1806, it made provision for redemption and judicial foreclosure by the procedure still in use. But this Regulation as was properly decided in the case of *Sureefoornissa* v. *Shaikh Enayet Hossain*, had not a retrospective operation upon titles which had become absolute before it came into force. The contract between this mode of proceeding and that followed by the Courts in Madras and Bombay, is obvious. The state of authorities being such as has been described, it may obviously become a question with this Committee in future cases, whether they will follow the decision in the 13th Moore's Indian Appeals, which appears to them based upon sound principles, as the new course of decision that has sprung up at Madras and Bombay, which appear to them to have been, in its origin, radically unsound. On a state claim to redeem a mortgage, and dispossess a mortgagee who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security, executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which

[1] 7 Mad. H. C. R., 395.

the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon the question until the necessity for determining it shall arise. They deem it right, however, to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature. An Act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without in justice to any party."

Note the case of *Vencatta Reddi* v. *Parvati Ammal.*[1] That relates to the mortgage by conditional sale in Madras known as *drishtabandhaka.* There the plaintiff sued for possession of a house and granary situate in the village of Revanur in the taluk of Kovilakuntta. The first defendant's husband, Vinareddi, had borrowed money from the plaintiff, and to secure the debt executed an instrument in his favour, dated the 24th November 1854, of which the following is a translation: "Bond executed to Crimatu Mallu Désireddigári Venkata Reddi (plaintiff) by Redemgudar Virareddi (first defendant's husband) residing in the said village on the 5th Margacirsha Cuddha of Annada (24th November 1854). I have, owing to my urgency, borrowed of you in cash ($4\frac{3}{4}$) pagodas four and three quarters, which I shall repay you with interest at $\frac{3}{16}$ V. per pagoda per mensem within six months from this date. In default, I shall, *considering this as an outright sale*, place in your possession, in satisfaction of the amount of principal and interest, the moiety on the east side, of (the house called) Padasala Yaddula Midde which I now occupy, besides, the part already mortgaged to Bodicherla Venkataguruvappa; and also the two tundus and half anganamu attached to the said house, and the whole of the ground thereunto belonging. To this I or my heirs shall not object in future. I thus execute this bond of my consent." The husband then left the country and was taken by all parties to be dead. His widow, the first defendant, borrowed a further sum from the plaintiff, and to secure its repayment executed a second instrument, dated March 24th, 1857, in the plaintiff's favour, of which the following is a translation: "Bond executed to Crimatu Mallu Désireddigári Venkata Reddi by Redemgudar Virareddi's widow, Private Ammal on the 13th Phalguna Bahula of Nala, (24th March, 1857). Owing to my urgency, I have borrowed of you in cash, on account of Bodicherla Venkata Chinna Guruvappa, Gadi Chauki pagodas (6) six. In satisfaction of the sum, I this day put in your possession (besides the moiety on the east side of Padasala Yaddula Midde (house) which is already in your possession), the upstair house of two beams (called) Kondi-

[1] 1 Mad. H. C. R, 460, (1862).

tuntala Pam Medde on the west side, which is now in possession of the said Bodicherla Chinna Guruvappa; the empty granary in front of the house; and the empty ground in front of Sandari house in the Avaranam. I shall not therefore object either to your renting it out to others, or to keeping there your own things. But as the house and ground are placed in your possession in lieu of interest on the principal, you ought to use them without rent. I shall repay the said principal, and take back possession of the said spot of ground on the 13th Phalguna Bahula of Pingala, (March 1858) which is next to this year. In default of my repaying the same within the term, I shall put in your possession the ground formerly mortgaged by my husband, together with the ground mortgaged by me, and remove myself to another place. I thus execute this bond of my consent." Default was made in payment of both loans. The District Munsif adjudged the proprietary right to be in the plaintiff and decreed to him possession absolutely. On appeal the Civil Judge modified the decree of the Munsif, and decreed simply that the first defendant should pay the plaintiff the principal sums due with interest. Thereupon, the High Court said :—This was a suit to recover certain property that had been mortgaged as security to the plaintiff, for the repayment of loans of money, by two written instruments—the one executed by the first defendant's husband and the other by the first defendant herself when a widow—default having been made in repayment of the loans. Both the lower Courts have found these instruments to be genuine and valid, and have given judgment in favour of the plaintiff, but they have passed different decrees. The original Court adjudging the proprietary right to be in the plaintiff, has decreed to him possession absolutely. The Civil Court in modification of that decree has passed a decree simply for payment by the first defendant of the principal sum due to the plaintiff with interest, on the authority, as it appears, of decisions of the Madras Sudder Court. The plaintiff has appealed against the decree of the Civil Court; and on his behalf it was contended that under the written instruments he became entitled to the property upon default made in repayment, and ought consequently to have a decree for possession. For the defendants (the respondents,) it was urged that the instruments operated only as mortgage securities, and that under the decree the plaintiff might realise the debt and costs by sale of the property in execution and so have all the benefit of the security. In the course of the argument reference was made to the Sudder Decisions at pages 26 and 40 of the Reports of 1860, page 20 of the Reports of 1861, and page 81 of the Reports of 1862. The first three of these decisions justify strictly the decree of the Civil Court; but in the fourth the Court appears to have regarded the specific charge or lien upon the property created by the mortgage instrument in preference to other claims, and to have expressly decreed a sale in satisfaction of the mortgage claim These decisions tend certainly to cause doubt and uncertainty as to whether the present form of suit

can be brought, and as to the mortgagee's right to a decree for possession; and we are called upon to consider them and say what in our judgment is the proper decree. The relief sought by the plaint is not simply the recovery of the mortgage deed but exclusive possession; and the right to such relief is based upon the ground, that the mortgage instruments operated as absolute sales to the plaintiff of the mortgagor's proprietary right upon default made as therein provided, and entitled the plaintiff to immediate possession. In effect therefore this is a suit by the mortgagee to obtain possession and to extinguish or foreclose all right and interest of the mortgagor, and those claiming under her; and in order to decide as to the decree we must consider what, as regards possession, were the rights of the mortgagors and the plaintiff as mortgagee, equitable as well as legal, under the mortgage instruments. They appear to be of the class of securities termed in Hindu law *Dristhabandhaka* (a mortgage, *bandhaka*, of real, substantial, visible, *drishtá*, property, under which the mortgagor remains in possession till the stipulated time arrives, Colbr. in 2 Strange, H. L. 467, 469.) The property is mortgaged, and a time is named for the payment of the money borrowed, and it is stipulated that on default the mortgagee shall be put in exclusive possession, and enjoyment of the property, one of the instruments exclusively providing that it should be considered "as an outright sale." The plaintiff, then, as a matter of contract, has, by reason of default of payment, acquired a right to demand and sue for possession of the property; and if the instruments of security were to be treated strictly as conditional sales, and default in payment as amounting to an immediate absolute forfeiture of all the mortgagor's proprietary right, the plaintiff was entitled in this suit to have the proprietary right of possession at once decreed to him. Instruments of this nature seem at one time to have had this strict operation given to them by the Courts: but it must now, we think, be taken that the law upon equitable grounds will not enforce the absolute right to immediate possession. Where the instrument appears clearly (as in this case) to have been entered into by the parties for the purpose of securing the repayment of a loan, the mortgagor, making the security subservient to the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment has been allowed to pass by; and in a suit for the recovery of possession, so as in effect to forclose or conclude all right of the mortgagor in the property (which the mortgagee is entitled to bring,) the Court, in decreeing the right to possession, should at the same time secure to the mortgagor an opportunity of redeeming the property, as he might have done before suit, by payment within a fixed time of the ascertained debt and interest which the mortgage instruments were given and intended to secure. For these reasons we think the proper decree to make in the suit is that the plaintiff do recover the possession

and enjoyment of the house and land, unless within three months, which appears to be a reasonable time, the defendants pay to the plaintiff the full amount of principal and interest found by the Civil Court to be due; but that upon such payment being made within the time specified all right and interest of the plaintiff under the said mortgage instruments shall cease, and the said instruments be given up to be cancelled."

Upon this subject, I ought to draw your particular attention to the remarkable judgment of SIR MICHAEL WESTROPP in Bapuji Apaji's case.[1] The learned Chief Justice not only endeavours there to trace the history of the law of conditional sale to the Brahmanic times, but also points out the distinction between a mortgage and a sale with a condition of repurchase. "The date of the transaction being the 23rd June, 1858," observes WESTROPP, C. J., "it becomes necessary, with respect to certain important observations of their Lordships of the Privy Council in *Thambusawmy Mudelly* v. *Mahomed Hossain Rowthen*,[2] decided in 1875, to resolve whether we should approach the consideration of this case from the point of view that the doctrine laid down in 1864 by three of the former Judges of this Court in *Ramji* v. *Chinto*,[3] and ever since uniformly followed here,[4] is that which regulates the law of redemption in this Presidency. If it do not, and if the law, as laid down for Madras in *Pattabhiramier* v. *Vencatarow Naichken*,[5] prevails now in Bombay, the decision of this case would be a very simple matter, and it would be sufficient to say that, whether or not the transaction of the 12th Jeth and Shakh 1780 (23rd June, 1858) was in the first instance a mortgage, the plaintiff's suit for redemption must fail, because the time named, within which the plaintiff might have re-acquired the land by payment of the sum of Rs. 275, had elapsed before suit brought. In *Pattabhiramier* v. *Vencatarow Naicken*,[6] LORD CHELMSFORD, in delivering the judgment of the Privy Council in 1870, said:—"What is known in the law of England as the 'equity of redemption' depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage-deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not then be supposed that, in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon." In 1872, in *Shankarbhai* v. *Kassibhai*,[7] it became necessary for this Court

[1] I. L. R 2 Bom., 239, (1877).
[2] L. R. 2 Ind. Ap., 255; S. C. I L. R. 1 Mad., 1.
[3] 1 Bom. H. C. Rep., 199
[4] 9 Bom H. C. Rep, 69, 79.
[5] 13 Moore I. A., 560.
[6] *Ibid.*
[7] 9 Bom. H. C Rep, 69.

to consider whether the decision in *Pattabhiramier* v. *Vencatarow Naicken*[1] rendered it necessary that the course pursued in *Ramji* v. *Chinto*[2] should be abandoned, and a Full Bench of three Judges sat for the purpose. That Court, having regard to the concluding sentence in the passage just quoted from the judgment of LORD CHELMSFORD, and to the fact that, from August 1864 down to May 1872, a period of about eight years, the doctrine of *Ramji* v. *Chinto*[3] had been uniformly followed in this Presidency in a multitude of cases, arrived, without hesitation, at the conclusion that their Lordships of the Privy Council did not desire or intend that the decision in *Pattabhiramier* v. *Vencatarow Naicken*,[4] which case had been pending in the Privy Council for about ten years, and which went from the Presidency of Madras, should have the effect of overturning the practice so firmly established in the Mofussil of this Presidency, and which has always prevailed in the island of Bombay. On the same day a Full Bench of four Judges, in *Krishnaji* v. *Raoji*,[5] and in two other cases mentioned in the note to the report of that case,[6] came to the same decision. We do not gather from the judgment of the Privy Council in the subsequent Madras case of *Thambusawmy Mudelly* v. *Mahomed Hossain Rowthen*[7] that this Court misunderstood the concluding sentence in the passage of the judgment of LORD CHELMSFORD which we have just quoted. In *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen*,[8] their Lordships, after adverting to the cases, said:—"The state of the authorities being such as has been described, it may obviously become a question with this Committee in future cases whether they will follow the decision in 13th Moore (*Pattaviramier* v. *Vencatarow Naicken*), which appears to them based upon sound principles, or the new course of decision that has sprung up at Madras and Bombay, which appears to them to have been *in its origin* radically unsound. On a state claim to redeem a mortgage, and dispossess a mortgagee, who had, before 1858, acquired an absolute title, there would be strong reasons for adopting the former course. In the case of a security executed since 1858, there would be strong reasons for recognizing and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted. Their Lordships abstain from expressing any opinion upon this question until the necessity for determining it shall arise. They deem it right, however, to observe that this state of the law is eminently unsatisfactory, and one which seems to call for the interposition of the Legislature. An act affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of

[1] 13 Moore I A., 560.
[2] 1 Bom. H C. Rep., 199.
[3] *Ibid.*
[4] 13 Moore I. A., 560.
[5] 9 Bom H. C. Rep., 79.
[6] *Ibid.*, 83.
[7] L R 2 Ind. Ap, 255; S. C. I. L. R. 1 Mad. 1.
[8] *Ibid.*

obtaining such a foreclosure with a reservation in favour of mortgagees whose titles, under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law without injustice to any party." In Madras the system of permitting redemption was adopted in 1858, and in Bombay the decision in *Ramji* v. *Chinto*[1] was made in 1864. The observations of LORD CHELMSFORD guarding against the supposition of any design on the part of their Lordships of the Privy Council to disturb any established course of decisions, were general, and took no distinction between mortgage transactions in Madras before 1858, and in Bombay before 1864, on the one hand, and mortgage transactions of later date on the other; and they were accepted as general by this Court, when, in 1872, it became necessary for it, in the cases already mentioned, to consider the scope of the judgment in *Pattabhiramier* v. *Vencatarow Naicken*[2] That case was heard *exparte* in the Privy Council,—a fact which appeared to this Court to have probably been a special reason for the cautious reservation in the judgment given on behalf of their Lordships by LORD CHELMSFORD. *Ramji* v. *Chinto*,[3] and the subsequent Bombay decisions were not then brought to their attention, and under all the circumstances we do not perceive how the Judges of this Court could have interpreted that reservation otherwise than they did. The decision in *Thumbasawmy Mudelly* v. *Mohamed Hossain Rowthen*,[4] in which case the observations upon *Ramji* v. *Chinto*,[5] which we have quoted, were made, was, in fact, that the deed was a mortgage and not a conditional sale, and accordingly the mortgagors were permitted to redeem. Those observations were fairly elicited by the turn which the argument of counsel took, but were not absolutely indispensable to the decision, as the nature of the decree made, shows Again, it must be remembered that the case came from Madras, and the Madras law only was the actual subject for determination. Finally, their Lordships, while intimating that there were strong reasons in favour of allowing redemption where the mortgages with clauses of conditional sale bear date subsequently to 1858, and of refusing redemption where the mortgages were anterior to 1858, expressly, as we have seen, abstained from giving any opinion on that question until the necessity for determining it should arise. In this state of facts we must regard the law as laid down for this Presidency by former Judges of this Court in *Ramji* v. *Chinto*[6] as in force. That case, although reflected upon, has not been overruled. It has, in this Presidency, been uniformly followed, and having been adopted by Full Bench decisions of this Court, which bind it, and all Courts subordinate to it, must, we think, govern

[1] 1 Bom H. C. Rep, 199.
[2] 13 Moore I A., 560.
[3] 1 Bom H. C. Rep, 199.
[4] L. R. 2 Ind Ap., 241; S. C. I L R. 1 Mad., 1.
[5] 1 Bom. H. C. Rep, 199.
[6] 1 Bom H. C. Rep, 199.

mortgages with clauses of conditional sale, executed either before or after 1858 or 1864, until the contrary be expressly ruled by the Privy Council or ordained by the Legislature. Special regard should be had to the terms which this Court has, with reference to improvements, repairs, &c., made by mortgagees in possession, imposed upon mortgagors seeking redemption in cases in which it would be equitable to recoup mortgagees for expenses thus incurred.[1] Mr. Macpherson's treatise on mortgages is written only with reference to Bengal and the N. W. Provinces. It, consequently, is seldom referred to here, and has but little bearing upon the law or usage as to mortgages in this Presidency of which that learned writer had not any experience. He speaks (p. 11, 2nd edition) of the *bye-bil-waffa*,—a term almost wholly unknown here to mortgagors and mortgagees;[2] and of the *kutkubala*—also unknown here in the sense of "conditional sale," that in which he employs it. Literally *kutkubala* signifies a written agreement, and would not here be understood as having the technical sense of "conditional sale." The term here usually applied to contracts, which undoubtedly are, in their inception at least, mortgages, but which contain a clause of conditional sale if the mortgage debt be not paid within a given time, is *gahan lahan*. In *Shankarbhai* v. *Kassibhai*[3] it was said, with reference to *Ramji* v. *Chinto*,[4] that "the recognition of the right to redeem" (in *gahan lahan* mortgages, where the time fixed for the sale to become absolute had expired,) "was, having regard to the previous decisions of the Sudder Adawlat, perhaps somewhat a strong measure," and that remark was justified, inasmuch as there had been several decisions of the Sudder Adawlat which had given a strict operation to the clause of conditional sale contained in *gahan lahan* mortgages. *Ramji* v. *Chinto*,[5] therefore, must be viewed as, to a certain extent, a breach of the venerable rule *stare decisis*, and in that respect to be regretted; but it was not intended by the remark in *Shankarbhai* v. *Kassibhai*,[6] to intimate any opinion that those decisions of the Sudder Adawlat were in conformity with the usage of the people of this Presidency as to such mortgages, which usage the Sudder Adawlat was bound to follow, or, in default of usage, "equity and good conscience."[7] In *Ramji* v. *Chinto*[8] it was said:—"It does not appear that there is

[1] See 9 Bom. H. C Rep., 72, 73.

[2] "The only instance," according to that authority, "known of a mortgage having been so denominated in this Presidency is in Manchana v. Kamrunisa (5 Bom. H. C. R, 109 A. C. J); the mortgagor there, being a Mussulman, probably imported the phrase from the other side of India, and did so with a slight variation"

[3] 9 Bom H C. Rep., 72.

[4] 1 Bom. H. C. Rep, 199.

[5] 1 Bom. H. C. Rep., 199.

[6] 9 Bom. H. C Rep., 72.

[7] Bom Reg. II, of 1800, sec. 14; Bom Reg IV of 1827, sec. 6.

[8] 1 Bom. H C. Rep, 199.

any law, or usage having the force of law, among Hindus, justifying such a departure from the established rule of the English Courts of Equity, which is, besides, manifestly 'a rule of good consience.'" The Court was there speaking of the usage of this Presidency, and the circumstance should not be overlooked that the members of that Court associated with SIR JOSEPH ARNOLD, himself an able Judge, were a Hindu gentleman and a European member of the Civil Service, both of extensive experience in the Mofussil of this Presidency. Not only is there not any reason for believing that the Courts of Justice, or Nyadsh, which existed here anterior to British rule, treated such mortgages as irredeemable, after the time fixed had expired, or enforced them as effective sales; but there is strong ground for believing that those mortgages never were so regarded by the people at large. Instances were, and still are, of frequent occurrence in which, after the time fixed for the payment of such mortgages had lapsed, and according to the terms of the *gahan lahan* clause, the mortgage had, ostensibly, become converted into a sale, the mortgagee made to the mortgagor further advances on the property the subject of the mortgage, and, as a general rule, the mortgage money is far below the value of the land, and would be wholly inadequate for its fair purchase. We do not know of any instance in which a suit, in British Courts, to foreclose *gahan lahan* mortgages has been rejected, and it is within the knowledge of the Judges of the present Division Bench that decrees for foreclosure and sale in such suits have been made, in which decrees a reasonable time (generally six months) has been given to the mortgagors to redeem. Although the High Court in *Ramji* v. *Chinto*[1] were guilty of an infraction of the maxim *stare decisis*, we believe the original innovation upon a well-settled and most beneficial usage was that of the Sudder Adawlat, and that the Judges who decided *Ramji* v. *Chinto* reverted to the generally-understood construction of *gahan lahan* mortgages. The reluctance of the people of this country to sell their immoveable property may be traced back for a long period. It is strongly manifested in chapter I, section 1, pl. 32 of the Mitákshará, which approves of mortgages, but reprobates sales, without absolutely pronouncing them to be invalid, adding that "if a sale must be made it should be conducted, for the transfer of immoveable property, in the form of a gift, delivering with it gold and water," as Mr. Colebrooke states "to ratify the donation." The Rishi Usanas went so far as to enumerate land amongst those species of property which are impartible. His Smriti to that effect is quoted by Vijnyanesvara in the Mitákshará, chapter I, section 4, pl. 26, and by Devanda Bhatta in the Smriti Chandrika, chapter VII, pl. 44. Devanda Bhatta, however, says that this text is to be overlooked and partition made. Usanas, however, did not stand alone in his doctrine. Prajapati also treated land as

[1] 1 Bom. H. C. Rep., 199.

indivisible. His text is quoted by Devanda Bhatta (Smriti Chandrika, chapter VII, pl. 49); as laying down that "no one is competent even to make a partition of the inheritance descended from ancestors. It is simply to be enjoyed; *there can be no gift or sale of the same.*" Against this may be placed what the same Smriti writer is quoted by Devanda Bhatta (pl. 47) as saying in favour of partition of houses of land. We are not to be understood as treating these texts of the Rishis denouncing partition of immoveable property as of any present operative force. We merely refer to them as showing how deep-seated in remote times was the antipathy of Hindus to aught even in approaching alienation of land. Mr. Steele, in his Law of Caste and Custom in the Deccan, p. 78, 18th ed., pl. 81 (p. 72, 2nd ed.) says:—"There is no limit, to the right of ownership of (immoveable) property pledged, by lapse of time; heirs of the original pledger may always claim it on repayment of the debt and interest." And, so far as regards usufructuary pledges, of which the *gahan lahan* mortgage on land is one, he is supported by an ancient text of the Rishi Vyasa, who, distinguishing between usufructuary and other pledges, says:—"But a pledge to be used of which the term has elapsed, the debtor shall only recover on then paying from other funds the exact amount of the principal;"[1] and also by a text from Narada, who, speaking of pledges generally, says that they are not lost to the owner through their being possessed by a stranger;[2] and Yájnavalkya similarly favours pledges.[3] Subsequently, however, at p. 80, pl. 86 (p. 74, 2nd ed.,) of his book, Mr. Steele says that "after Smarte Karl (Kale), the period beyond which recollection does not extend, *viz.*, 100 years, he (the mortgagor) loses his ownership in the property." In this also he is supported by Narada,[4] who, it must be remembered, represents a more modern phase of doctrine than the Smriti writers, Usanas, Prajapati, and Yájnavalkya, above quoted. In the country under Mahratta rule, as the greater part of this Presidency was, the ryot, who was a landed proprietor, was generally known as a *mirasdar*, and his holding as *miras*.[5] In that portion of the able report of the commission for inquiring into the causes of the recent riots in the Deccan which describes "the condition of the ryot as regards his relation to the money-lender when British rule commenced" (chapter III, p. 27), it is said: "There was a considerable burden of debt, and many of the ryots were living in dependence upon the saukar (money-lender), delivering to him their produce, and drawing upon him for necessaries. The ryots' property did not offer security for large

[1] 1 Dig Bk I, Ch 3, pl CXVI, 2nd cl.

[2] Jolly's trans. of Narada, p 24, pl 9.

[3] 1 Dig Bk. 1, pl CXIII, CXIV.

[4] Jolly's trans, p 25, pl 18

[5] See Deccan, Commission's Report, chap III, pp 28, 30, paras 43, 45.

amounts; his cattle and the yearly produce of his land being the lender's security, the mortgage of *miras* land was rather a means by which the saukar got a firmer hold upon the produce than upon the land itself, *for immoveable property was not sold for debt*, and the *miras* title would have no value for a non-agricultural landlord." And, again, "the creditor received little or no assistance from the State in recovering debts, but had great licence in private methods of compulsion." What those private methods were, is previously described at p. 26, thus:—"The usual and recognized method of recovery of debt was for the saukar to send a mohosul (muhassil), that is, a servant whose maintenance had to be paid by the debtor, or to place a servant in *dharena*, at his door, which is the process called *tuquaza* (*tagada*, or *takaza*) by Mr. Chaplin, or to confine the debtor in his house, or otherwise subject him to severer measures."[1] Those severer measures are detailed by Mr. Mountstuart Elphinstone. Describing *takaza* he says: "Though it strictly means only denouncing, it is here employed for everything from simple importunity up to placing a guard over a man, preventing his eating, tying him neck and heels, or making him stand on one leg with a heavy stone on his head under a vertical sun."[2] Captain Grant's Reports of 30th April 1819,[3] shows that such was the mode of enforcing payment of debts. Mr. Chaplin in his report of the 20th June 1819,[4] said, with reference to the enforcement of decrees: "The person cast seldom had his property sold; but he was compelled to submit to much personal violence, amounting to a degree of torture, &c." There were in fact very few regular Courts.[5] Mr. Chaplin in his report of the 20th August 1822, para. 112, says: "In the commentaries of Hindu law, it is said that land can be conveyed by the formal assent of the townspeople; but it is also declared that the permission of the king, if not his express assignation, is necessary to give validity to the alienation. This rule seems to be recognized by most Hindu law authorities, and it would, in my opinion, be superfluous to cite facts to prove that it is the established usage." And, again, in para. 121, he says that the *mirasdars* "seldom alienate the *miras* right except in case of urgent necessity." Of Central India, where as well as in this Presidency, the Mitákshará is held in great repute, SIR JOHN MALCOLM, in Vol. II, p. 75 of his work on that country, observes that "the cultivators are chiefly of the hereditary class, and have not only a right to till the ground, but, if in distress, can mortgage it; and to take it from them, under any circumstances, is deemed the extreme of tyranny." Notwithstanding this general reluctance to sell, sales were, to some extent, made and carried into effect anterior to British rule; but (generally speaking)

[1] See, also, Wilson's Glossary, pp. 138, 502.
[2] 4 Revenue Selections 193, Report of 25th Oct. 1819.
[3] *Ibid*, p. 228.
[4] 4 Revenue Selections, p. 260.
[5] *Ibid*, p. 262.

those were from the commencement of the transaction intended to be sales, and not contracts, which, in their inception, were mere securities for money lent. Such sales were made of immoveable property, as well of superior as of inferior classes of tenure, and have been subsequently, and still are, supported by the British Courts when not restricted by special legislation[1] (see *Krishnarao* v. *Rangrav*[2] and the cases and authorities there collected, and *Vyakunta, Bapaji* v. *The Government of Bombay*[3]) and when not prohibited by the common law or usage of the country[4] or by some special law affecting the parties. Our reports are full of cases in which private sales of immoveable property, which were complete, have been supported. Taking, then, *Ramji* v. *Chinto*[5] to be law in this Presidency, and that, accordingly, the rule is, once a mortgage always a mortgage, it becomes necessary to consider whether the transaction of the 12th Jittesad, Shak 1780 (23rd June 1858), comprised in exhibits 18 and 14, ever was a mortgage. If the transaction were, *in its inception*, really intended by the parties to be a mortgage, the mere circumstance that the condition for repurchase is contained in a separate instrument, could not prevent the grantors from having the right now to redeem. The question is—did there after the execution of exhibits 18 and 14, remain any debt due from the grantors of exhibit 18 to the grantee of that instrument; or, in other words, could the grantee have enforced repayment of the sum of Rs. 275 by the grantors? In *Goodman* v. *Grierson*,[6] which was a suit for redemption, LORD MANNERS, C, said: "The fair criterion by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this. Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants (mortgagees) to file a bill of foreclosure. By the practice of this Court (Irish Court of Chancery), the decree is for a sale of the mortgaged premises, if they be not redeemed within the time limited by the course of the Court: suppose the sale to take place, and the produce to be insufficient to discharge the £1,000 and costs, how is the deficiency to be raised? What remedy could the defendants then have? If it were a mortgage, he, in that case might proceed on his covenant or bond, upon the implied assumpsit; but how could any action be maintained in this

[1] Such *ex-gr.* as Bom. Reg. XVI of 1872, s. XX, cls. 1 and 2.

[2] 4 Bom H. C. Rep, 1 A C J.

[3] 12 Bom. H. C Rep, App, pp 50, 71, 100, 171, and, in addition to the references to Vol 4 of Revenue Selections given there in note (q), p. 71, see pp. 411, 651, and 179 of that Vol of Rev. Sel

[4] *Ex-gr.* as in the case of *Jagirs. Hari Ramchandra* v *Narayan Rao*, Reg. Ap. 39 of 1872, (decided on review 13th June 1871). Printed judgments of 1877, p. 121.

[5] 1 Bom H. C. Rep., 199.

[6] 2 B. and B, 279.

case, when the defendants have taken the conveyance, not as a security, but expressly in lieu and satisfaction of the portion of £1,000? This appears to me decisive to show that the transaction between these parties was not that of a mortgage, but a conditional sale; for, if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party; and there appears to me to be no substantial ground to entitle the other to relief." His Lordship referred to a note (No. 96) by Mr. Butler to his edition of Coke upon Littleton, 205*a*, where, in considering what constitutes a mortgage, Mr. Butler says: "No particular words or form of conveyance are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or by any other instrument, it is always considered in equity as a mortgage and redeemable; even though there is an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons." After referring to numerous decisions in support of those views, Mr. Butler continues thus:—In many of these cases the Courts have found it necessary, not only to apply their general principles, but to determine the fact, whether the conveyance was intended as an absolute sale, or as a security for the money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or, if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the Courts as tending to prove that the conveyance was intended to be merely pignoritious. It seems, however, to be settled, 1st, that a *bonâ fide* purchaser of an estate or interest will not be considered a mortgagee on account of a right to purchase being given to vendor, though at an advanced price: *Verner* v. *Winstanley*;[1] and, 2ndly, that where the mortgagee, or trustee for him, is authorized to sell, if the money be not paid at a particular time, he may make a good title to a purchaser, though the mortgagor do not join in the conveyance: *Clay* v. *Sharpe*."[2] Applying this doctrine to the present case (but not by any means asserting that Mr. Butler's enumeration of the indications that a transaction is a mortgage and not a sale is exhaustive), we find neither evidence nor alle-

[1] 2 Sch. and Lef, 393.

[2] Reported by Sudgen in his Law of Vendors, 4th ed., App., No. XIII.

gation that Rs. 275 were, at the date of exhibits 18 and 14, an insufficient consideration for the sale of the land. Further, we do not find any stipulation that the grantee should account for the rents and profits during his possession, or for payment of interest by the grantors on the sum of Rs. 275, either before, at, or after the expiration of the time fixed within which the lands might be repurchased by the grantors. Had there been any such stipulation, it might have aided us in arriving at the conclusion that the transaction was the creation of a debt, and not a sale. A mere stipulation, however, (unaccompanied by any other indication that the transaction was a mortgage) that, should the repurchase take place, the original purchase-money shall be repaid with interest, has been held by LORD COTTENHAM, overruling SHADWELL, V. C., insufficient to stamp a case as one of mortgage and not of sale: *Williams* v. *Owen*.[1] Again there is nought to show that the grantors remained in possession after the execution of exhibits 18 and 14, or that, subsequently to that time, any advances were made by the grantee to them on the security of the land. There is not in either of these documents anything which points to a right on the part of the grantee to recover from the grantors the sum of Rs. 275, or any part of it, either before, at, or after the period named for the repurchase. In short, we do not find any one of the usual indicia which might lead the Court to the opinion that the transaction was a mortgage and not a sale. In *Verner* v. *Winstanley*,[2] and in *Murphy* v. *Taylor*,[3] there were collateral bonds which vitiated the transactions there as sales, and showed that the parties all along contemplated the subsistence of a debt. We have nothing of that kind in this case. It strongly resembles *Ensworth* v. *Griffith*.[4] There the relation of mortgagor and mortgagee had once existed, and the mortgagor, in consideration of the mortgage debt, and of a further sum paid, released the equity of redemption, and at the same time the mortgagee signed an agreement to reconvey the premises upon payment of the two sums within one year. A bill for redemption, brought in the Court of Exchequer, was dismissed, and the dismissal was affirmed by the House of Lords. In *Williams* v. *Owen*,[5] already mentioned, and which, in respect of the circumstance as to interest which I have stated was a stronger case in favour of the grantors than the present, LORD COTTENHAM said:—"That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage, is no doubt, true; but it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not, of itself, entitle the vendor to redeem;" and he expressed his appro-

[1] 5 Myl. and Cr., 303.
[2] 2 Sch. and Lef., 393.
[3] 1 Ir. Ch. Rep., 92.
[4] 5 Bro. P. C., 184.
[5] 5 Myl. and Cr., 303.

bation of LORD MANNERS' doctrine in *Goodman* v. *Grierson*,[1] and eventually said :— "If the transaction was a mortgage, there must have been a debt; but how could Owen have compelled payment? It appears also, that he, as purchaser, paid for the conveyance, and was, at all events, to be at liberty to keep the rents." So recently as the 4th July last, in Regular Appeal 23 of 1877,[2] a Division Bench of this Court acted on the principle laid down by LORD MANNERS in *Goodman* v. *Grierson*,[3] where the grantee under a deed had no remedy to recover as a debt the consideration money for the deed, which we held to be a sale, liable, on a contingency which did not happen, to be converted into a mortgage, and not, like *Ramji* v. *Chinto*,[4] and *Shankarbhai* v. *Kassibhai*,[5] and the cases collected in it, which were instances of mortgages liable in terms to be converted into sales. We see no ground for supposing that the defendants, or the persons whom they represent, had, from the 12th Jeth-sud, Shak 1780, the date of exhibits 18 and 14, any right to sue for or recover the sum of Rs. 275 (the consideration of exhibit 18), or any part of it; we must, therefore, hold the transaction of that date to have been a sale and not a mortgage, and that the plaintiff's suit to redeem was rightly dismissed."

In Bengal, the transaction of *bye-bil-waffa* became more frequent by reason of the law against usury.[6] Note this passage in Harington's Analysis :[7] "Under the prohibition of the Mahomedan law against the taking of interest upon money lent, as well as for the greater security of money-lenders, whether Hindu or Mahomedan, by having a pledge equivalent, or superior in value, to the sum advanced by them; it has long been a prevalent practise to borrow money on the mortgage, and conditional sale of landed property under a stipulation that if the sum borrowed be not repaid (with or without interest) by a fixed period, the sale shall become absolute: this species of transfer is usually denominated *bye-bil-waffa* in the province of Behar where it is most frequent, and is also common in Bengal under an instrument termed *kut cobala*: the promulgation of Regulation XV of 1793 increased the prevalence of this transaction with a view to avoid the limitation of interest, and instances occurred in which persons lending money on *bye-bil-waffa* in order to render the sale absolute, denied the tender or evaded receiving payment of money due to them within the period limited for the discharge of it; in such cases the proof of the tender falls upon the borrower, and if he fail, from want

[1] 2 B. and B., 279.

[2] *Subábhat* v. *Vasudevbhat*, I. L. R., 2 Bom., 113.

[3] 2 B. and B., 279.

[4] 1 Bom. H. C. Rep., 199.

[5] 9 Bom. H. C. Rep., 69.

[6] See Regulation XV of 1793 for fixing the rates of interest on past and future leases.

[7] 1 Harington's Analysis, 185.

of legal evidence, he is liable to lose his estate. It was therefore necessary for the security of the borrower in such transactions, that he should have the means of establishing before the Courts of Judicature of his having tendered or being ready to pay within the stipulated period the amount due from him to the lender." It was accordingly enacted by Regulation I of 1798 that "in all instances of the loan of money on *bye-bil-waffa*, or on the conditional sale of landed property, however denominated, the borrower who may be desirous to redeem his land by payment of the money lent upon it with any interest due thereon within the stipuluted period, is at liberty on or before the date stipulated, either to tender and pay to the lender the amount due to him, taking such precautions as he may think necessary to establish such tender and payment, if evaded or denied, or without any tender to the lender to deposit the amount due to him on or before the stipulated date in the Dewany Adawlat."

It should be observed that this Regulation left untouched the terms of the contract as settled between the parties, and therefore on failure on the part of the mortgagor under a *bye-bil-waffa* to pay the debt on the stipulated day, the mortgagor was for ever debarred from redeeming the property. "The equity of redemption," observes Mr. Harington,[1] "'allowed by the English Courts of Equity,—though a mortgage be forfeited and the estate absolutely vested in the mortgagee by the common law—whereby the mortgagor is permitted at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest and expenses, has not yet been extended to Indian landholders who may have mortgaged and conditionally sold their lands under deeds of *bye-bil-waffa*, or *kut kabala*. The stated condition of such deeds, and the established practice of the country in construing them upon failure to convey an absolute sale to the mortgagee have probably operated against the introduction of this reasonable advantage allowed to mortgagors in England." Under the provision of Regulation XVII of 1806, a *bye-bil-waffa* became redeemable like other mortgages although the time of payment might have passed away. Consider sections 7 and 8 of that Regulation :—"In addition to the provisions made in the provinces of Bengal, Behar, Orisa, and Benares, by Regulation I of 1798, and in the ceded and conquered provinces by Regulation XXXIV, 1803, for the redemption of mortgages and conditional sales of land, under deeds of *Bye-bil-waffa*, *kut kabala*, or any similar designation, it is hereby provided, that when the mortgagee may have obtained possession of the land, on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender, of the sum lent under any such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged, or when the mortgagee may not have been

[1] 1 Harington's Analysis.

put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor, and owner of such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed, in the manner provided for in the following section; that is to say, at any time within one year (Bengal, Fussily, or Willaity, according to the era current, where the mortgage may take place,) from and after the application of the mortgagee to the Zilla or City Court of Dewany Adawlat, for closing the mortgage, and rendering the sale conclusive, in conformity with section 8, of this Regulation, provided that such payment or tender, be clearly proved to have been made to the lender and mortgagee, or his legal representative; or that the amount due be deposited, within the time above specified, in the Dewany Adawlat of the zillah or city in which the mortgaged property may be situated; as allowed, for the security of the borrower and mortgagor in such cases, by section 2 Regulation I, 1798, and section 12 Regulation XXXIV, 1803: the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation." Then, "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive, on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply, for that purpose, by a written petition to be presented by himself, or by one of the authorized vakeels of the Court, to the Judge of the zilla, or city in which the mortgaged land, or other property, may be situated. The Judge, on receiving such written application, shall cause the mortgagor, or his legal representative, to be furnished, as possible, with a copy of it, and shall at the same time notify to him, by a *purwanah* under his seal and official signature, that if he shall not redeem the property mortgaged, in the manner provided for by the foregoing section, within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

Consider the case of *Pran Nath Roy* v. *Rookea Begum.*[1] In the Report of that case you will find the form of a *kut kabala*, and the decision[2] is, moreover, an illustration of the redeemableness of a *kut kabala* under the Regulation law. Two persons, *Meer Sydoo* and *Noor Jehan* jointly borrowed of the Appellant in the case the sum of Rs. 4,001, in cash, and at the last-mentioned date jointly executed and delivered to him a *kut kabala* or *bye-bil-waffa* (deed of conditional

[1] 7 Moo I. A 323, (1859).

[2] 7 Moo. I. A., p. 347.

sale) in the following form:—"To the high in dignity, *Baboo Prannath Chowdry*: this mortgage deed, or *kut kabala*, of the land or garden-house, held under a *Khirajee-pottah* (rent lease), is executed in the year 1231, by *Meer Sydoo* and *Bebee Noor Jehan*, *Mekahee* wife of the said *Meer*, inhabitants of *Cossipore;* in the village of *Cossipore* within the jurisdiction of *Dihee*, *Punchannagram*, is our dwelling-house, with the garden measuring 14 *beegahs* and 7 *cottahs* of land, the annual rent of which is Rs. 38 10 a. 18 g: having mortgaged the said garden house and *jumma* lands, with the appurtenances, to you, we have received Rs. 4,001, as a loan through *Ramchunder Bose*, of *Cossipore*, on which we will pay interest at one rupee per mensem; the term of payment of the money is three years, from the date of the deed of mortgage, that is, up to 11th *Cheyt*, 1234: we shall pay the whole of the money with interest at once within this term; if we do not pay the money with interest at once within the term, the sale of the said land, with the appurtenances, will become absolute on the day after the expiration of the term for the said amount, as consideration money, and you being in possession of the said land after the expiration of the term, and having obtained a *pottah* in your own name, shall, with your descendants, enjoy the proceeds by paying the Government Revenue; the right of alienating the said lands, either by gift or sale, will rest with you; we shall have no claim or objection; any deed of payment of money produced by us, other than that of redemption of mortgage. by repayment of the money at once, is null; and if the money should have to be paid by the sale or mortgage of the said land, it will be sold to you at a reasonable rate, or mortgaged, if it will have to be mortgaged; if we sell or mortgage to anybody else, it will be null and void: we or our heirs shall never raise any objections in violation of these terms; and should we do so, they will be false and null: having received the said amount of Rs. 4,001, from hand to hand in ready money, we have of our free will executed this mortgage deed, or *kut-kabala*. Dated the 11th Cheyt of the aforesaid year." Some time afterwards, and on the 4th May 1825, Meer Sydoo and Noor Jehan borrowed a further sum of money from the appellant; and at the same time respectively executed and delivered to him another *kut-kabala* to secure by a like conditional sale of the same dwelling house, land and premises mentioned in the first *kut-kabala*, the repayment to him of the further sum borrowed, together with interest at the same rate and at the same date, subject to the like terms and conditions as those respectively specified in the former instrument. "These instruments of conditional sale," in the words of LORD KINGSDOWN, "have now an operation different from that which they originally had. They are mortgages now, redeemable like ordinary mortgages, and subject to foreclosure. If the transaction be viewed as it should now be regarded under the Regulations, as one of mortgage, redeemable at any time by the mortgagor, or those claiming under him in privity with his title as mortgagor, then, as no

difference between the law prevalent in India and the law prevalent here as to the relation between mortgagor and mortgagee on this point has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem, and advance no other title inconsistent with it, must, *primâ facie* at least, be treated as perfectly reconcileable with, and not adverse to, the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes, be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality. The mortgagee, under this form of mortgage, unless he be put into possession of his pledge by the act of the mortgagor, must, according to the law prevalent in the Courts of the East India Company, under the Regulations, seek the assistance of a Court to give him possession of his pledge. When his object is also to foreclose the mortgage, he must effect that object in the mode prescribed by Regulation III of 1793, sec. 14; Regulation II of 1805, sec. 3; and Regulation XVII of 1806, secs 7 and 8. If this mode be not followed, the foreclosure will not be regular, and the mortgagee's title to possession will not be complete."

Under the Transfer of Property Act, "a mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, and existing or future debt, or the performance of an engagement which may give rise to a pecuniary liberty."[1] Note the words *specific immoveable* property. This is in accordance with the view expressed in *Deojit* v. *Pitambar*.[2] There, the portion of the bond on which the plaintiff relied as creating a charge was as follows:—"And we hypothecate as security for the amount our property with all the rights and interests (*hakyat apne kul haq haquk*)." The Court said, "if the debtors had described themselves as the owners of certain property and then gone on to pledge their rights and interests, it would have been reasonable to refer the indefinite expression to the description. In this case the debtors simply describe themselves as residents in a place and pledge "*kul haq haquk*." This case falls within the principle of the decision that a general hypothecation is too indefinite to be acted upon. Under the Contract Act, s. 29, an agreement is void if its meaning is not certain or capable of being made certain, and under s. 93 of the Evidence Act, where the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. Our observations are intended to impress upon money-lenders that distinctness in the description of property mortgaged, is essential."

[1] Section 58, (*a*).

[2] I L. R. 1 All. 275, (1876).

Clauses (*b*) (*c*) (*d*) and (*e*) of section 58 of the Act define the four special forms of mortgage. And Clause A, Section 67 lays down a material distinction between the kinds of mortgage. Their language is perfectly clear. Observe, however, in connection with usufructuary mortgage, the Zaripeshgee leases in common use in Hindustan. It is said that a Zaripeshgee lease (literally, *Zar* gold, money, and *peshgee*, advance) is a lease granted on a sum of money being advanced, the usual condition being that the lessee should continue in possession until he has from the rents and profits repaid himself the interest, or, it may be, the principal and interest, of the sum advanced by him. Such a lease is usually treated as a usufructuary mortgage. In Basant Lal's case,[1] "Zaripeshgee lease," it was said, "or a lease granted on a sum of money being advanced, is of the nature of a usufructuary mortgage; it is true that such leases often are on the same footing as pure usufructuary mortgages, but this is only when there is a power of redemption reserved to the lessor, either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be one in the nature of a mortgage."

Compare the *antichresis* of the Roman law, where the creditor is allowed to take the fruits of the pledged property in payment of the interest on the loan (ut creditor, pro pecuniæ debitæ usuris, fructus rei pignoratæ habeat)[2] This is reproduced in Article 2085 of the French Code.

Like the Zaripeshgee of Bengal, there are the Otti or Veppu and Kanam mortgages of Madras. These, also, are in the form of leases and treated as usufructuary mortgages. The mortgagor is called the *Jenmi*, and the mortgagee the *Kanamdar* or *ottidar*. The mortgagee has, according to custom, the right to hold for 12 years. The *ottidar* has the right of pre-emption, and the option of making further advances, if asked for; but not so the *Kanamdar*.[3]

I may note here a purely local kind of mortgage in use in Guzerat, known as *Sankhat* or *San* mortgage. It is entirely like the Roman mortgage of hypotheca

Note, that *bye-bil-waffa*, and its analogues, the *drishtabandhaka* of Madras, and *gáhan láhan* of Bombay are thus included in clause (*c*), under the domination of "mortgage by conditional sale." "When the mortgagor ostensibly sells the mortgage property—(i) on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or (ii) on

[1] I. L R 3 All., 8.

[2] D 13, 7, 35.

[3] Shekara Panıker's case, I. L R 2 Mad. 193, Kunahalı's case, I. L R 3 Mad. 74, Kunhannés case, I L R 3 Mad 246, Cherıa Krıshnam's case, I. L. R 5 Mad. 198, Kanara's case, I L R 5 Mad 310, Marakar's case, I L R 6 Mad 140, Vasudevan's case, I. L R. 7 Mad. 309.

[4] Sobbagchand Gulapchand's case, I. L. R 6 Bom, 193.

condition that on such payment being made the sale shall become void, or (iii) on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale."

A mortgage by conditional sale will, however, be always distinguishable, according to the intention expressed in the document, from a sale with a condition of repurchase. In Bhoop Kuar's case,[1] it was held by STRAIGHT, C. J. that an agreement by the purchaser of certain immoveable property that it should, on payment by the vendor of a certain sum within a specified time, be restored to the vendor, and that on failure of such payment it should become the absolute property of the purchaser, did not create the relation of mortgagor and mortgagee between the parties, and upon the vendor's failure to repurchase within the stipulated period the property vested in the purchaser.

Under the Act. as has already been observed, a writing attested and registered is necessary for the validity of a mortgage of the value of one hundred rupees or upwards: "Where the principal secured is one hundred rupees or upwards," in the words of section 59, "a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses; where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

As observed in *Vadya* v. *Vadya*,[2] the right to redeem and the right to foreclose are co-extensive. Read and compare sections 60 and 67 of the Transfer of Property Act. Under the Limitation Act, a mortgagee is entitled to bring a suit for foreclosure or sale within sixty years from the time when the money secured by the mortgage becomes due.[3] And likewise a mortgagor may bring a suit against a mortgagee to redeem or to recover possession of immoveable property mortgaged within sixty years from the time when the right to redeem or to recover possession accrues.

I ought to mention here that under the Bengal Regulations, the mortgagor in a foreclosure suit was entitled to a year's grace to pay up the mortgage debt, and on his failure to do so, the mortgagee's decree became final. In Madras and Bombay the time allowed by the Courts was generally six months. Under the Transfer of Property Act, one uniform rule of six months' time has now been prescribed.

[1] I. L. R 6 All, 38.

[2] I L R. 5 Bom, 22

[3] The Limitation Act (XV of 1877), second Schedule Art, 147.

You have noticed that the English law is extremely jealous of any condition, the tendency of which may be to clog in any manner the mortgagor's right to redeem; it is provided, however, by the last paragraph of section 60 of the Transfer of Property Act that "nothing in this section shall be deemed to render invalid any provision to the effect that if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee should be entitled to reasonable notice before payment or tender of such money."

On the subject that the right to redeem and foreclose is co-extensive, and that there can be no redemption before time, it will be well to refer to Sakhárám's case decided by the Bombay High Court in 1865[1] There the plaintiff alleged that his father, Narasinhaw, being the owner of a saltpan at the village of Shiravada, by deed of the 11th of February 1829, mortgaged it, in consideration of Rs. 100, to Lakhabin Gonda, for a term of sixteen years. The plaintiff produced a copy of that mortgage, and prayed that he might be declared entitled to redeem. The defendant, in reply, alleged that the plaintiff's brother, Baburao Narasinha, by deed of the 23rd of May 1841, referring to the mortgage of 1829, and reciting that four out of the sixteen years yet remained unexpired, remortgaged the saltpan, to secure. to Lakhabin Gonda the sum remaining due for principal and interest on the mortgage of 1829, and a further advance, amounting in the aggregate to Rs. 195-6-0 This second mortgage provided that on the expiration of the abovementioned period of four years, the mortgagees should remain in possession as tenants at Rs 21 per annum. This document specified no term for such tenancy, and was very obscurely penned The defendant Vithu, son and heir of the mortgagee, Lakhabin Gonda, and Tutta Vith-Gonda, father of the defendant Rama, having advanced to the said Baburao Narasinha a further sum of Rs. 115-4-3, he executed a document in their favour, which was as follows:— "Damulapatra: 10th Pousha Shudha Shake 1777 Name of the year Rakshasa. The day of the week Thursday. To Futta Vith Gonda and Vithu Lakha Gonda, Gavokar Shiruadekar, inhabitant, &c, by Baburao Narasinha Perdesai Khatgavakar, inhabitant, &c. I do pass this dumalapatra (supplementary writing as follows):—my vitani saltpan at the village of Shiravada was formerly mortgaged to you, a mortgage-deed on a stamp paper having been passed in the name of Lakha Vith-Gonda. Besides that, on the aforesaid saltpan, I have this day received from you in cash Rs 115-4-0. Paying the same with interest at the rate of two per cent, I will redeem the said saltpan twenty-five years from this day, that is to say, at the time of redeeming, after paying the

[1] 2 Bombay, H. C. R. 225.

money, as written in the mortgage deed, at that time the amount of this supplementary writing, Rs. 115-4-0, with interest at the rate of two per cent., to be first paid, at that time I will redeem the saltpan and other documents (*sic*). Should any of my kinsmen raise a disturbance, I will pacify them. If I do not pacify them, and you be put to any expense on that account, or should there be any obstacle of your receiving the produce of the mortgaged property in lieu of interest, that money also I will pay with the interest at the rate of two per cent. If you should not receive interest on the said mortgaged property, and if some injury be caused to the said saltpan by order of Government, all this I will pay with interest at the rate of two per cent. I will not fail herein. I have passed this supplementary writing of my own free will. Dated 17th January 1851." Upon this WESTROPP, J. observed:—We think that the intention of the parties was, that there should not be any right of redemption, until the expiration of the term of twenty-five years, mentioned in the mortgage of the 17th of January 1856. Previously to the year 1845, some conflict of opinion seems to have existed amongst text-writers in England, as to the right of the mortgagor to redeem before the expiration of the period named in the proviso for redemption, Mr. Coote, in his work on Mortgages,[1] expresses an opinion in favour of the mortgagor, and cites in support of it *Talbot* v. *Braddyl*.[2] That opinion, however, is ably controverted in the fifth volume of Jarman and Bythewood's Conveyancing, edited by Mr. Sweet,[3] where it is shown that *Talbot* v. *Braddyl* rested on special grounds, which rendered it of title or no value as an authority on the question. The well established right in England of a mortgagee to six months' notice, previously to the payment of the mortgage money, seems to recognise the principle that an immediate right of redemption is not necessarily incident to a mortgage; *Sharpnell* v. *Blake*.[4] The case of *Brown* v. *Cole*,[5] decided by SHADWELL, V. C., on the 13th of February 1845, is a direct authority upon the question. It is matter of regret that the report of that case should be so meagre, as neither to state the authorities cited in the arguments of counsel, nor the reasons assigned by the Vice-Chancellor for his judgment. A demurrer was there allowed to a bill of redemption, filed before the mortgage had become absolute, notwithstanding that the mortgagor had tendered to the mortgagee the principal money, and interest up to the day named in the proviso for redemption. That case is a very strong one, and no appeal seems to have been preferred against the decision of the Vice-Chancellor, allowing the demurrer;

[1] 2nd edn, p 33 See also Powell on Mortgages

[2] 1 Vernon, 183, 394.

[3] "Messrs Burroughs and Greeson, in their treatise on The Irish Equity Pleader, pp. 125, 126, also deny the right contended for by Mr. Coote."

[4] 2 Eq Ca. Abridged, 603, pl. 34.

[5] 4 Simon, 427.

which we presume to have proceeded upon the principle that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive.[1] In *Borrowes* v. *Molloy*,[2] which was the converse of the present case, LORD ST. LEONARDS refused to allow the mortgagee to foreclose before the expiration of the time specified. In *Cowdry* v. *Day*,[3] the question as to the right to redeem before the day named, was once again raised before STUART, V. C., in November 1859; but was not decided, as the case was disposed of on another ground. In the present state of the English authorities, however, we think that such a right cannot be regarded as existing in England: Fisher on Mortgages, page 80, para. 122, and page 88, para. 134. The parties here being Hindus, we must also look to the Hindu law on this question. In Colebrooke's Digest, Brihaspati is quoted as saying: "When a house or field mortgaged for use has not been held to the close of its term, neither can the debtor obtain his property, nor creditor obtain the debt." At paragraph CXCVIII the same dictum is repeated with this addition: "After the period is completed, the right of both to their respective property is ordained; but, even while it is unexpired, they may restore their property to each other by mutual consent." In the present case we have not any such consent. In Morley's Digest, N. S., page 259, plac. 11, it appears that in *Anrood Singh* v. *Raja Dummur Singh* (a suit between Hindus), and in *Oomrao Begum* v. *Indurjeet*, two cases which arose in the North-West Provinces, the right of the mortgagor to redeem, before the expiration of the term named in the mortgage, was denied by the Court. In *Kahandas Mulji and another* v. *Mithabhai Jivandas and others*, FORBES and NEWTON, JJ., on the 10th of July 1865, affirmed in this Court a decree of the Senior Assistant Judge of Ahmedabad, which dismissed a redemption suit instituted before the term (ten years), for which the property was mortgaged, had expired. Finding, then, the same principle to exist both in the English and the Hindu law, that the right of the mortgagor to redeem does not, in the absence of any circumstance or language indicating a contrary intention, arise any sooner than the right of the mortgagee to foreclose, we hold this suit to have been prematurely insisted."

It will be unnecessary to consider the sections of the Transfer of Property Act in detail; suffice it to say that the principles embodied in those sections are on a footing with the English law on the subject. For instance, the rights and duties of the mortgagor and mortgagee, how the mortgagee while in possession is

[1] See also the observations of LORD KINGSDOWN in 7 Moo. Ind. App. 355.

[2] 2 Jo and Lat., 521.

[3] 5 Jurist, N. S., 1199.

bound to account, how far he is liable for deterioration, to what allowance, if any, will he be entitled for improvements, the right to accession, in case of what loss or destruction of the mortgaged property, will the mortgagee become entitled to call for another security, the question of priority among mortgagees, for what causes the prior mortgage may be postponed to a subsequent, the doctrine of marshalling and contribution: these are all on the lines of the English law, and the sections of the Transfer of Property Act which deal with these questions are sufficiently clear.

There are, however, a few points to which I wish to draw your particular attention. You have already seen that a mortgage cannot be redeemed in parcels; but there may be cases in which the mortgagee should in justice be bound to give up a portion of the property on payment of a proportionate part of the mortgage-money. This may be placed upon the principle of *cessante ratione cessat lex.* Note this paragraph in section 60: "Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except when a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor." There seems to have been some doubt in our Courts whether a mortgagee under a power of sale in the Mofussil could exercise that right without the intervention of a Court of Justice. In Pitambar Narayen Das's case,[1] WESTROPP, C. J., after a review of the Indian authorities, held that "a sale, without the intervention of a Court of Justice, of mortgaged lands situate in the Mofussil of Bombay, under a power of sale, contained in an indenture of mortgage in the ordinary English form, is valid, if due notice be given to the mortgagor of the mortgagee's intention to sell, and the sale be fairly conducted." This rule has now been modified and curtailed by section 69 of the Transfer of Property Act. Under that section a power of sale is exerciseable in the manner laid down in the following cases, only, "(*a*) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mahommedan or Buddhist; (*b*) where the mortgagee is the Secretary of State for India in Council; (*c*) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi, or Rangoon."

Section 80 of the Transfer of Property Act professes to abolish Tacking. In English law, with reference to the rights of middle, mesne or intermediate incumbrancers, the doctrine of tacking has been thus stated. In æquali jure melior est conditio possidentis, *i. e.*, where rights are equal, the person in possession will have the better of it, or as it has sometimes been expressed, "he that hath only a title in equity shall not prevail against law and equity." Thus, a mort-

[1] I. L. R. 2 Bom., 1.

gagee coming in upon a valuable consideration *without notice*, and purchasing in a precedent incumbrance shall be able to protect his estate against any person that has a mortgage subsequent to the first and before the last mortgage, though he purchased in the first incumbrance, after he had notice of the second mortgage or intermediate mortgage. In *Wortley* v. *Birkhead*,[1] in the words of LORD HARDWICKE, "the doctrine of tacking arises from the existence of two jurisdictions," that is to say, Common law and Equity. In Mofussil India there never existed two separate jurisdictions, and therefore the doctrine of tacking was never recognized.[2] Note, also, the provision of section 16 of the Yorkshire Registries Act:[3] "In any case in which priority or protection might but for this Act have been given or allowed to any estate or interest in lands by reason or on the ground of such estate or interest being protected by or tacked to any legal or other estate or interest in such lands, no such priority or protection shall, after the commencement of this Act, be so given or allowed to any estate or interest in lands."

Section 99 of the Transfer of Property Act puts an end to a positive evil. There are numerous cases which show that a mortgagee may obtain a mere money decree on his hypothecation bond and in execution of the decree have the property sold, and thereafter bring a suit to enforce his lien on the property.[4] The authors of the Act refer to this circumstance in these words: "There is a common practice on the part of mortgagees of suing their mortgagors on the debt as such, and in execution selling the mortgagor's interest in the property; this is purchased by strangers to the mortgage who are thus virtually defrauded by an enforcement of the security of the existence of which they were wholly ignorant; in order to check this practice, we have framed a section providing that when a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches and brings to sale the mortgaged property, or the mortgagor's interest therein, his security shall be existinguished unless before the issue of the proclamation under the Civil Procedure Code, he gives notice thereof to the Court executing the decree." This suggestion has been thus improved upon in section 99 of the Act:—"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, etc." Observe that the right of the mortgagee to bring two separate actions on the same instrument, namely, one for a simple money decree, and the other to enforce his lien, is really an exception

[1] 2 Ves Sen, 574.

[2] Udoychurn Rama's case, 11 W. R. 310, Gaurmanarayan Magunudas's case, 5 B L. R. 463.

[3] Statute 47 and 48 Vict., c. 54

[4] See Narsidas Jitran's case, I L. R 4 Bom 63, and the cases there discussed.

to the rule that a man should not be vexed twice upon the same cause of action (in eadem causâ nemo bis vexari potest). This generally arises when there is a personal covenant whereby the mortgagor not only binds the mortgaged property, but also agrees to hold himself personally responsible for the debt. As is usually the case in a mortgage-bond. In such an instance, the mortgagee may, as a mere creditor, or rather in the capacity of an unsecured creditor, bring a suit for the money, and obtain a money decree; and, again, afterwards, bring a separate suit on the security in enforcement of his lien as mortgagee.[1] Thus, the mortgagee may be said to have a double right of suit.

The general principle of the English law is that most acquisitions by a mortgagor enure for the benefit of the mortgagee increasing thereby the value of his security, and that many acquisitions by the mortgagee are in like manner to be treated as accretions to the mortgaged property or substitutions for it, and therefore subject to redemption.

Where an Oudh talukdar granted an usufructuary mortgage of a portion of his taluk, in respect of which there existed certain subordinate *birt* tenures, and the mortgagee subsequently acquired these *birt* tenures by purchase, but did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the taluq, the Privy Council held that the mortgagor was entitled, in a suit of redemption on repayment of the original mortgage debt, and on reimbursing the mortgagee the sum expended in purchasing the *birts*, to re-enter on the estate with all the rights and privileges enjoyed by the latter. At the same time, their lordships refused to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage, must be taken to have been made for the benefit of the mortgagor so as to enhance the value of the mortgaged property, and make the whole including the sub-tenure, subject to the right of redemption on equitable terms.[2]

Read section 63 and section 70 of the Transfer of Property Act: section 70 is in these words: "If after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary shall, for the purposes of the security, be entitled to such succession." Section 63 deals with the mortgagor's right to any accession that may have arisen to the property during the possession of the mortgagee.

The distinction betwen a charge and a mortgage is clearly drawn for the first time in the Transfer of Property Act. Hitherto the term "charge" was used as a general expression which included mortgage.[3]

[1] Rajkishore Shaha's case, I. L R. 7 Cal, 78.

[2] Rajakishen's case, I. L. R. 5 Cal 198, (P. C)

[3] Sarwar Hossain Khan's case 9 W R. 170, Ramdin v. Kalkapershad, I. L. R. 7 All. 502, (P. C.).

I ought to tell you that a mortgage of whatever kind is a conventional transaction, having for its basis the agreement or contract between the parties, and founded upon a valuable consideration; whereas what is now defined as a "charge" under the Act relates principally to rights which arise in respect of another's property by operation of law. There are, however, also certain conventional transactions which are included in the definition; for instance, a person may give some land to another, and at the same time charge it with his debts.[1] In the words of the Act,[2] "Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." And some of the provisions relating to mortgage are made applicable to a "charge." Nothing is said in the Sections about writing or registration. But read Section 17 cl. (*b*) of the Registration Act.

Note that securities which arise by operation of law come under the denomination of "lien" in English law. The word "lien" means a tie,[3] that is, a right that binds the property itself. Mr Fisher tells us that "as to immoveable property, the kind of security most nearly allied to an hypothecation is a charge of a portion or other sum of money under a will or settlement, which not arising from operation of law, cannot properly be called a lien."[4] It is clear that what are strictly called liens under the English law, as well as the kind of charge alluded to in the passage, are both included in the definition of "charge" under the Act.

Compare with "Charge" the "tacita hypotheca" of the Roman law, and the "privilége" of the French law. Under the Roman law, among other instances of tacit hypothecs, there is the hypotheca of the Exchequer (Fiscus) which embraced all the property of the debtor whether the debt was for taxes or contract; then, a wife had a hypotheca over the husband's property for the restitution of her *dos*.[5] Observe that, under the British India law, the Government revenue is a charge upon the land out of which it is payable, and takes precedence of all other claims[6] In the words of Regulation X of 1793, Section 19, all malguzari lands are deemed to be mortgaged in the first instance for the payment of the public revenue assessed thereon. But, "where," under section 73 of the Transfer of Property Act, "mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds after payment thereout of the said arrears, for the amount due on the mortgage, unless the sale has been

[1] Wheeler v. Claydon 16 Beav, 169.

[2] Section 100

[3] Latin *ligamentum*, French *lien*.

[4] Fisher on Mortgage.

[5] Hunter's Roman Law

[6] Macpherson on Mortgage, 112.

occasioned by some default on his part." Under the French law, here are some instances of priviléges :—The seller is said to have a privilége over the immoveable property sold for the payment of its price, or in the words of our Act, the vendors' lien for the purchase money. Likewise, those who have supplied money for the acquisition of an immoveable have a privilége over the property.[1]

Note that in Regulation VIII, of 1819, s. 3, it is enacted that if a *patni talook* is about to be sold for non-payment of the rent due to the zemindar, any of the taluqdars of the second degree may pay the amount and stop the sale, and "if the person or persons making such a deposit in order to stay the sale of the superior tenure shall have already paid the whole of the rent due from himself or themselves, so that the amount lodged is an advance from private funds, and not a disbursement on account of the said rent, such deposit shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means, and the taluq so preserved shall be the security to the person or persons making the advance, who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter, in order to recover the amount so advanced from any profits belonging thereto." Bengal Act, VIII of 1869, section 2, applied the provision to the case of a tenure about to be sold under that Act, and the payment of the rent by "any one interested in the protection of the under-tenure." Under the Bengal Tenancy Act, VIII of 1885, s. 171, a like protection is given to any person, having in a tenure or holding advertized for sale an interest which would be voidable upon the sale, who pays the amount requisite to prevent the sale.

The only trace of lease that I have been able to find in the old Brahmanic law is the case of a person living on the land of another. "He who," according to Nárada, "lives in a house built by him on the ground of another paying rent for it, may take with him when he leaves it the thatch, the wood, the brick and the like; but whoever dwells on the land of another without paying rent or without agreement must make them over to the landlord."[2]

In the Roman law, lease came under the denomination of letting and hiring or *locatio et conductio*. The contract of *locatio* and *conductio* embraced various matters, out of which *locatio-conductio rerum* represented lease. The lessor was called the *locator* and the hirer *conductor*. The *conductor* or hirer of a house was known under the name of *inquilinus*, and that of a farm under the name of

[1] Code Napoleon, Article, 2103.

[2] V. 1, 129 · Note the words of Nárada: परभूमौ गृहं कृत्वा क्षोमं दत्त्वा वसेत्तु यः &c. क्षोमं = भाटकं; in Bengali ভাড় = rent or hire.

colonus The amount to be paid for the hiring of houses or land was called *pensio* or *reditus*. The contract of letting and hiring is said, in the Institutes,[1] to approach very nearly to that of sale and is governed by the same rules of law; as the contract of sale is formed as soon as a price is fixed, so a contract of letting and hiring is formed as soon as the amount to be paid for the hiring has been agreed on. Note that if a house were burnt down, during lease or after hire the tenant was not bound to pay any rent. The owner was bound to keep the thing in a state such that the hirer could enjoy the use agreed upon; if the thing became deteriorated, the hirer might demand a reduction of the rent or a release from the contract, trifling repairs, however, had to be executed by the hirer.[2] Moreover, the tenant was permitted to take away any fixtures that he might have erected on the land, provided that such removal did not injure or deteriorate the property.[3] And the tenant was likewise entitled to compensation for improvements made by him such as it was not possible to remove.[4]

There are two special kinds of leases under the Roman law, namely, the Emphyteusis and the Superficies. According to M. Ortolan, at the time of Gaius the Emphyteusis was known under the name of a perpetual lease. Ortolan ascribes its origin to the desire of the State as well as of large landed proprietors to provide for the cultivation and reclamation of land which the proprietors were unable to manage themselves.[5] The Superficies was also a perpetual lease; but was confined only to constructions raised on the land and did not extend to the land itself.[6]

In Mussulman law, *ijara* is the general term for lease or hire. Upon a tenant taking possession of a house he becomes bound for the rent, although he should not reside therein. It is laid down that at the expiration of the lease, the land must be restored in its original state. "If a person," in the words of the Hedaya, "hire unoccupied land for the purpose of building or planting, it is lawful, since these are purposes to which land is applied; afterwards, however, upon the term of the lease expiring, it is incumbent on the lessee to remove his buildings or trees, and to restore the land to the lessor in such a state as may leave him no claim upon it, because houses or trees have no specific limit of

[1] Institutes of Justinian, Lib. III, Tit., 24.

[2] Hunter's Roman Law.

[3] D. 19, 2, 19, 4: "si inquilinus ostium vel quædam adjecerit ei tollere liceat," says Labeo, "sic tamen ut damni infecti caveat."

[4] "In conducto fundo si conductor suâ opera aliquid necessario vel utiliter auxerit vel ædificaverit vel instituerit ad recipienda ea quæ impendit ex conducto cum domino fundi experiri potest." D 19, 2, 55, 1.

[5] Ortolan, Vol III, 294—295.

[6] *Ibid*, p. 298.

existence, and if they were left upon the land it might be injurious to the proprietor; it is otherwise where land is hired for the purpose of tillage, and the term of the lease expires at a time when the grain is yet unripe; for in such case the grain must be suffered to remain upon the land, at a proportionable rent, until it be fit for reaping, because, as the time that may require is limited and ascertainable, it is possible to attend to the right of both parties. In the case, on the contrary, of trees or buildings, it is impossible to pay attention to the right of both parties; and it is therefore incumbent on the lessee to remove his trees or houses from the land;—unless the proprietor of the soil agree to pay him an equivalent, in which case the right of property in them devolves to him (still, however, this cannot be, without the consent of the owner of the houses or trees; except where the land is liable to sustain an injury from the removal in which case the proprietor of the land is at liberty to give an equivalent, and appropriate the trees or houses without the lessee's consent);—or unless the proprietor of the land assent to the trees or houses remaining there, in which case they continue to appertain to the lessee, and the land to the landlord; for as the right of removing belongs to the landlord, he is at liberty to forego that right." The contract of hire is determined by, among other things, a hidden defect in or decay or destruction of the subject of the lease. For instance, if a person hire a house, and then discover a defect in it, such as renders it uninhabitable, he is at liberty to dissolve the contract, unless by making use of the house he assents to the defect. Then, if a house fall to decay, or the wells for watering land dry up, or a mill stream cease to run, the contract of hire is dissolved, because in such case the thing contracted for, namely, exclusive advantage, is defeated before possession, or when a hired slave dies."[1]

In the French law, which is in the main a reproduction of the Roman law, the Titles on lease and usufruct may, with advantage, be read together. Of the two kinds of *louage* (hiring), we are concerned with what is called the louage of things. Louage of things again is divided into two classes, namely, (i) the louage of houses and moveables (*bail à loyer*), (ii) agricultural or farming louage (*bail à ferme*).

The hiring of things is a contract by which one of the parties binds himself to give up to another the enjoyment of a thing during a certain time, and for a certain price which the latter binds himself to pay him. Hiring may take place either verbally or by writing.

The lessee has the right to underlet or even to assign his lease to another, if such power has not been restricted.

The lessor is bound by the nature of the contract and without the necessity

[1] 3 Hamilton's Hedaya, 325.

of any particular stipulation, (i) to deliver to the hirer the thing hired, (ii) to maintain such thing in a state to be employed for the use for which it was hired, (iii) to put the hirer in peaceable possession thereof during the continuance of his lease.

The lessor is bound to deliver the thing in a good state of complete repair. He must make in it, during the continuance of the lease, all the repairs which may become necessary other than tenant's repairs, (or the trifling repairs of the Roman law).

Warranty is due to the lessee against all faults or defects of the thing hired, which may impede the use thereof, even though the lessor should not have known them at the time of the lease. If from such faults or defects any loss result to the hirer, the lessor is bound to indemnify him.

If during the continuance of the lease (*bail*) the thing hired is absolutely destroyed by accident (*par cas fortuit*), the lease is rescinded; if it be only in part destroyed, the lessee may, according to circumstances, demand either a diminution of the price or the rescinding of the lease itself. In neither case is there any ground for indemnification (*dédommagement*). If the reparations which the thing may stand in need of be of such a nature that they render that uninhabitable which is necessary for the lodging of the lessee (*preneur*) and his family, the latter may cause the lease to be rescinded. Also, the contract of hiring is dissolved by the loss of the thing hired.

Next as to usufruct. Usufruct is the right of enjoying things of which the property is in another, in the same manner as the proprietor himself, but on condition of preserving them substantially (*d'en conserver la substance*).

The usufructuary (l'usufruitier) is entitled to the augmentation accruing by alluvion to the object of his usufruct. The usufructuary has no right over mines and quarries not yet opened, nor over peat bog, nor over treasure which may be discovered during the continuance of his usufruct.

In English law, a lease is defined "to be a conveyance by way of devise of lands or tenements, for life or lives, for years or at will, but always for a less term than the party conveying himself has in the premises; for if it be for the whole interest, it is an assignment and not a lease. A lease is usually made in consideration of rent or some other annual recompense rendered to the party conveying the premises—who is called the lessor or landlord—by the party to whom they are conveyed or let who is called the lessee or tenant."[1]

Observe that many of the leading principles which govern the relation of vendor and purchaser and mortgagor and mortgagee, *mutatis mutandis*, are applicable to the rights and duties of lessor and lessee. A lease like a motgage may not inaptly be described as a *pro tanto* sale.[2]

[1] Woodfall's Landlord and Tenant, 124. [2] See Hopkins v. Bolt, 9 H. L. Cases, 514.

In the Transfer of Property Act, which is substantially a modification of the English law on the subject, "a lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such term. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent." Under the Act, writing and registration are absolutely necessary in the case of important leases. Read section 107 of the Act.

Section 106 lays down the presumption as to the duration of a lease in the absence of a contract, and draws a distinction between agricultural or manufacturing leases, and leases for other purposes. In the case of the former, the presumption is that the lease is from year to year; in the case of the latter, the lease shall be deemed to be one from month to month; terminable in the one case by six months' notice and by fifteen days' notice in the other. Read that section.

As in the case of sale, the lessor is bound to disclose to the lessee any latent defect of which the lessor is aware; but the defect must be of a material kind so as to detract from the intended use of the property; and so, also, is the lessee bound to disclose to the lessor any fact known to him but of which the latter is unaware which materially increases the value of such interest. In the case of patent defects the English rule of *caveat emptor* will no doubt apply. Observe what was ruled in *Keates* v. *Earl of Cadogan*: "There is no implied duty in the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so in the absence of express warranty, or active deceit." JERVIS, C. J., there said: "It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, an action of deceit will lie: the declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, *viz.*, make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it; there is nothing amounting to deceit; it was a mere ordinary transaction of letting and hiring."[1]

In *Lucas* v. *James*,[2] the question arose whether on the discovery of the

[1] 10 Common Bench Rep

[2] 7 Hare's Rep. 418, (1849).

character of certain houses in the immediate neighbourhood of the house which was the subject of the lease, the would-be lessee had a right to abandon the agreement. SHADWELL, V. C. there observed: "The law as stated by SIR EDWARD SUGDEN, respecting defects in the subject of a contract, (and I believe correctly) is this, that if the vendor at the time of the contract does not know of the existing defect in the estate the Court will enforce the contract, otherwise, perhaps, if the defect be known to the vendor *and* be one which a provident purchaser could not discover."

As in the case of mortgage, any accession which arises to the property during the lease shall be deemed to be comprised in the lease. The lessee is bound to use the property as a person of ordinary prudence would use it if it was not his own; but he must not fell timber, pull down or damage buildings or work mines or quarries not open when the lease was granted or commit any other act which is destructive or permanently injurious thereto. The lessee must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes. Note that the lessor is at liberty to transfer the property leased; but subject to the terms of section 109. So, also, may the lessee transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it; but the lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. The Act in treating of the rights and liabilities of the lessor and lessee lays down that such rights and liabilities may be controlled by positive covenant or contract between the parties, and should always be construed by the light of local usage, if any. But I wish to draw your particular attention to clauses (*e*) (*f*) and (*g*) of section 108 in this connection. Para. 1 of cl. (*e*) probably marks a departure from the English law on the point. It is a principle of the English law, as explained in the books,[1] that when "*the law* creates a duty and the party is disabled to perform it without any default in him and he has no remedy over, the law will excuse him; but when the party *by his own contract* creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it when making the contract." Accordingly, under the English law, it has been held that "the landlord of premises demised under a written agreement, may recover against his tenant, in an action for use and occupation, the rent accruing after the premises are burnt down:" that was the case of *Baker* v. *Holtpzaffell.*[2] It appears, however, that the judgment of MANSFIELD, C. J., was there based on the fact that the tenant had made no offer to deliver up the premises. "The land," observes that learned Judge, "was still in existence,

[1] Woodfall's Landlord and Tenant, 13th edition, 408. [2] 4 Taunton 45, (1811).

and there was no offer on the part of the defendant to deliver it up; the landlord could not enter to re-build, the tenant might have re-built the premises if he had so pleased, and occupied them at any time within the term, he therefore must be taken still to hold the land." In *Sharp* v. *Milligan*,[1] SIR JOHN ROMILLY, M. R was of opinion that a covenant on the part of the lessee to keep the mill in good tenantable repair ought not to exclude damages by fire or tempest.

Under the Transfer of Property Act, section 108, cl. (*e*), paragraph 1, in the absence of express stipulation, it is at the option of the lessee to avoid a lease "if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force (*vis major*) any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let." This is in accordance with the Roman, French and Mussulman laws.

Note that clause (*f*) of the section does not state, as does the French law, what repairs the landlord is bound to make and what the tenant; but leaves that question to the contract between the parties. It provides, however, that if, under the covenant, the landlord fails to make the repairs within a reasonable time after notice, the lessee may make them himself, and either deduct the expenses with interest from the rent or recover the amount by suit. Read also clause (*g*)

There does not appear to be any provision made in the Act for compensation for improvements and the like to the retiring tenant as in the Roman and Mussulman laws; but that question is left to the contract between the parties.[2] Clause (*h*) of section 108 is to this effect: "The lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it." Moreover, "when a lease of *uncertain duration*, as, for instance, a lease for the life of the lessor, determines, the lessee or his representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them."

Note the provision of section 111 as to when and under what circumstances a lease of immoveable property will determine, and consider in connection therewith the effect of surrender, on the one hand, and forfeiture, on the other, on under-leases as explained in section 115.

Section 114 provides for a special relief against forfeiture arising from non-payment of rent which is somewhat in the nature of a mortgagor's right to redeem after expiration of the stipulated time.

[1] 23 Beav. 419, (1857).

[2] Section 108, cl. (p).

Compare with the provisions of sections 114 and 115, the provision of section 14 of 44 and 45 Vict. c. 41,[1] and note the difference. Section 14, cl. 1 is in these terms: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." Clause 2 is as follows:—"Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief, and the Court may grant or refuse relief, as the Court having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of any injunction to restrain any like breach in the future, as the Court, in the circumstances ef each case, thinks fit."

Section 116 of the Act relates to the effect of holding over after the determination of the lease. Note that it was ruled in Nocoordass Mullick's case that "so far as there is any custom in Calcutta, or any inference of fact to be drawn from mere occupation accompanied by payment of a monthly rent, it is, that the tenancy is a monthly one."[2]

Section 117 speaks of the exemption from the Act of leases for agricultural purposes. These are all the remarks I need make on the subject.

I have already observed that the system of Registration of deeds is of great importance in giving security to the titles and rights of transferees of immoveable property. Its object is to render an act of transfer a public and notorious act so as to give notice to the whole world of the exact status of the subject matter of the transfer. And thus the somewhat intricate question which is often likely to arise in a competition between several transferees of the same property, as to whether the later transferee had or had not notice of the prior transaction, is obviated. No doubt, possession is notice to the world of the title of the person in possession. It was said in Lakshmandas's case[3] that "possession has been deemed to amount to notice of such title as the person in

[1] Conveyancing and Law of Property Act, 1881.

[2] 12 B. L. R., 263.

[3] I. L. R. 6 Bom, 168.

possession may have, and any other person who takes a mortgage or other charge upon immoveable property without ascertaining the nature of the claim of him who is in possession, does so at his own risk; this is the rule in English law also." But there are numerous transactions, such as mortgages without possession, which effect no change of ownership and leave the debtor in possession. "A hypotheca" in the words of Professor Holland, "presents this great convenience that it effects no change of ownership and leaves the debtor in possession; but it labours under the disadvantage of easily lending itself to a fraudulent preference of one creditor over another, since it may be effected by an agreement of the parties concerned without the knowledge of any one else; it is also difficult for the creditor to whom the property is offered as security to make certain that it has not been already encumbered."[1] It would appear that in England the system of Registration which prevails so largely on the Continent of Europe had met with failure;[2] although there have been several Registry Acts, from time to time.[3] The latest English Registry Act is confined to Yorkshire.[4] I will draw your attention to a few of the leading provisions of that Act. Under the Act, Registration is optional. It thus provides for the Registration of a lien or charge: "Where any lien or charge on any lands within any of the three ridings is claimed in respect of any unpaid purchase-money, or by reason of any deposit of title-deeds, a memorandum of such lien or charge, signed by the person against whom such lien or charge is claimed, may be registered by any person claiming to be interested therein."[5] Note that all assurances entitled to be registered under the Act "shall have priority according to the date of Registration thereof, and *not* according to the date of such assurances or of the execution thereof."[6] Note, also, that "the registration of any instrument under this Act shall be deemed to constitute actual notice of such instrument, and of the fact of such registration to all persons and for all purposes whatsoever, as from the date of registration."[7]

In British India, the first attempt to introduce Registration is Regulation XXXVI of 1793. The object is thus stated in the preamble: "To give security to the titles and rights of persons purchasing real property, or receiving such property in gift, or advancing money on the mortgage of it, or taking it on lease, or other limited assignment; to prevent individuals being defrauded by buying

[1] Holland's Jurisprudence, 174.

[2] Holland's Jurisprudence, 175.

[3] Stat. 7 Anne c. 20, or the Middlesex Registry Act, and Stat. 2 and 3 Anne c. 4, 6 Anne c 35, 8 Geo. 11, c 6, or the Yorkshire Registry Acts.

[4] 47 and 48 Vict. c. 54.

[5] *Ibid*, s. 7.

[6] *Ibid*, s 14.

[7] *Ibid*, s 15.

or receiving in gift, or lending money on mortgage, or taking on lease any such property that may have been so previously disposed of, or pledged, to afford to persons the means of obviating, as far as may be practicable, litigation respecting the authenticity of their wills, or any written authority they may grant to their wives to adopt sons after their death; and that individuals may be able to provide against any injury to their rights or property by the loss or destruction of deeds relating to transactions of the nature of those above specified." Section 3 of the Regulation enumerates the documents, or the memorials of deeds as said there, that may be registered:—" (*i*) Deeds of sale, or gift of lands, houses and other real property: (*ii*) Deeds of mortgage on land, houses and other real property, as well as certificates of the discharge of such incumbrances: (*iii*) Leases and limited assignments of land, houses, and other real property, including generally all conveyances used for the temporary transfer of real property: (*iv*) *Wusseatnamahs* or wills: (*v*) Written authorities from husbands to their wives to adopt sons after the demise of the former." The Regulation does not make registration compulsory in respect of any document, nor is registration necessary for the validity of any document. All that it says is, that in respect of transactions (i) and (ii) every registered document of one class shall have priority over an unregistered document of the same class in respect of the same property;[1] but with this qualification. "it being the object, however, of the rules in the two preceding clauses to prevent persons being defrauded by purchasing or receiving in gift, or taking in mortgage, real property which may have been before sold, given, or mortgaged, and as persons can never suffer such imposition when they are apprized of the previous transfer or mortgage of the property, it is to be understood, that if any person shall purchase, receive in gift or take in mortgage, any real property, knowing such property to have been previously sold, given or mortgaged, to any other person, and that the deed of sale, gift or mortgage has not been registered, and shall register his own deed, in such case the deed of sale, gift or mortgage of such subsequent purchaser, donee or mortgagee which may have been registered shall not from the Registry of it invalidate or be discharged in preference to the unregistered deed of sale, gift or mortgage first executed."[2] Note in connection with this passage the words of LORD HARDWICKE in *Le Neve* v. *Le Neve*:[3] "It would be a most mischievous thing if a person taking advantage of the legal form appointed by an Act of Parliament might, under that, protect himself against a person who had a prior equity of which he had notice."

The provisions of the Bengal Regulation, it would appear, were afterwards introduced in the Mofussil of Madras and Bombay.

[1] Regulation XXXVI of 1793, s 6, clauses 1 and 2.

[2] *Ibid*, Cl 3.

[3] 1 Ves. sen. 64.

The next Registration Act was Act I of 1843 which included Bengal, Madras, and Bombay. The object of that Act was to do away with the effect of notice insisted upon in the Regulation, and thus give absolute preference to registered over unregistered documents independently of notice. The reason of the modification is thus set out :—" Whereas the Registry Laws now in force in the respective Mofussils of Bengal, Madras, and Bombay, provide that registered conveyances and other instruments, affecting titles to lands and other interests therein, shall not take precedence of unregistered conveyances and instruments in cases where the party registering shall have known of the existence of such unregistered conveyances or other instruments: and whereas a complicated system of laws has arisen out of the construction which is to be given to the provisions regarding the knowledge of parties or notice had by them in such cases; and whereas much perjury has been committed in investigation touching the fact of such notice or knowledge, and much of the time of the Courts has been occupied with such investigations: and whereas, in consequence of forgeries, perjuries, fraudulent concealments, and other practices, no person purchasing or advancing money on the security of land can safely rely on the conveyances or other instruments affecting the title to such land or other interest therein, affording, by means of their being registered, a security against conveyances or instruments being set up, as of previous date, by unregistered claimants; it is hereby enacted that all provisions contained in any Regulation or Regulations of Bengal, Madras, or Bombay Codes, touching such knowledge or notice as aforesaid of previous unregistered conveyances, or instruments affecting titles to land, or other interests therein, shall be repealed from the first day of May next."

Note, also, that the Act for the first time laid down in clear language that documents prior in registration should be prior in rank: "And every conveyance or other instrument affecting title to land, or any interest in the same shall so far as regards any lands to which the same relate, be void as against any person claiming under any subsequent conveyance or other instrument duly registered, unless the prior conveyance or instrument shall have been duly registered before the registration of the subsequent conveyance or instrument; any alleged notice or knowledge of such prior conveyance or instrument notwithstanding."

Then followed Act XIX of 1843 which stating that "doubts had arisen as to the true meaning and construction of Act No. I of 1843" proceeded to lay down clearly these words :—" Every deed of sale or gift of lands, houses or other real property, a memorial of which has been or shall be duly registered according to law * * shall invalidate any other deed of sale or gift for the same property which may not have been registered. * *—And that from the said day every deed of mortgage on land, house or other real property as well as certificates of the discharge of such incumbrances, a memorial of which has

been or shall be duly registered according to law * * shall be satisfied in preference to any other mortgage on the same property which may not have been registered." Note that this Act left the question of notice where it was under the former Act.

In Moheshur Bux Singh's case,[1] a question arose on the construction of Act XIX. There the plaintiff claimed a lien on certain lands under a bond by which they were pledged or mortgaged to him; the defendant was a purchaser in possession under a deed of sale from the same proprietor of a subsequent date, but duly registered, while the plaintiff's bond was not registered. The point raised in argument on behalf of the plaintiff was that, while Act XIX of 1843 gave to a registered deed of sale the preference over an unregistered deed of sale, and to a registered deed of mortgage the preference over an unregistered deed of mortgage, it gave no preference to a registered deed of sale over an unregistered deed of mortgage, and that being the description of the two deeds before the Court, defendant could derive no benefit under Act XIX of 1843. CAMPBELL, J., in referring the matter to the Full Bench, said: "A very literal reading of the Act would be as plaintiff says, and the late Sudder Court seems to have so construed it; but, on the other hand, there can be no doubt that the effect of such a construction is to stultify and render of no avail the whole Act." The majority of the Full Bench, however, held that under the provisions of Act XIX, a registered *deed of sale* did not invalidate a prior unregistered *mortgage*. PEACOCK, C. J., after quoting the former part of Act I of 1843, went on to say: "the effect of the Regulation, *i. e.*, Act I of 1843, therefore, was to repeal that part of the former Regulation, *i. e.*, Regulation XXXVI of 1793, which allowed proof of notice of a prior deed in order to prevent priority being given to a subsequent registered deed." Then, after referring to the latter part of the Act, the learned Chief Justice proceeded:—"These words were, in my opinion, sufficient to give a preference to a registered deed of sale over a prior unregistered mortgage and *vice versâ;* but when we find the Legislature repealing that Act upon the ground that doubts had arisen as to the meaning and construction of it, and returning to the words of Regulation XXXVI of 1793 instead of using those of Act I of 1843 which they had before them, we cannot say that their intention was different from that which the words used by them import."

Next followed Act XVI of 1864. That Act introduced several important modifications. It rendered the Registration of certain documents absolutely necessary. "No instrument," in the words of section 13, "being a deed of gift of immoveable property, no lease of immoveable property for any period exceeding one year, no instrument (other than a gift or lease as aforesaid) which

[1] 5 W. R. 61 (1868).

purports or operates to create, declare, transfer, or extinguish any right, title or interest of the value of one hundred rupees or upwards in any immoveable property, and no instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, transfer or extinction of any right, title or interest as above, of such value as aforesaid, in any immoveable property shall be received in evidence in any Civil proceeding in any Court, or shall be acted on by any public officer, * * * unless the same shall have been registered." The Act also altered the rule of priority among registered instruments. Formerly priority of rank among registered documents was as in the English Act according to priority of Registration; but section 67 of the Act of 1864 lays down that "a registered instrument shall operate from the time from which it would have commenced to run if no registration had been required or made, and not from the time of its registration." I may venture to express a doubt whether this was a real improvement, and whether the words of CAMPBELL, J., before quoted, in another sense, was not applicable to this provision. The main object of Registration, it should be borne in mind, is to give publicity to an act of transfer and notice of the fact to others.

Section 16 of the Act enumerates cases in which Registration was made optional including an authority to adopt a son; and in accordance with the view of CAMPBELL, J., already referred to, in cases of optional Registration, a registered instrument of whatever class or nature was allowed to have preference over an unregistered instrument whether of the same nature or not. These are the words of section 68: "Every instrument of the description mentioned in clauses 1 and 2 of section 16, shall, if duly registered, have priority to any other instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not." Thereby reverting to the words of the latter part of Act I of 1849 in preference to those of Act XIX of 1843.

Then came the Registration Act, XX of 1866. That Act left matters very much the same as before. Section 13 of the Act of 1864 with little more than some verbal alteration was broken up into two sections in the Act of 1866, *viz.*, section 17 and section 49. Section 16 of the Act of 1864 was similarly transcribed in section 18 of the Act of 1866.

Section 67 of the former Act is reproduced verbatim in section 47 of the Act of 1866. Section 68 of the Act of 1864 finds a place with some modification in section 50 of the Act of 1866. But mark the difference or addition introduced in the new Act, so far as it is pertinent to our purpose. All that the former Act said by section 13 was, that certain titles relating to immoveable property if reduced to writing must be registered in order to be of any avail; but the provision which the new Act introduced was to the effect that preference should in every case be given to registered instruments over oral agreements relating

to the same property, thereby virtually insisting upon writing and registration. This is provided for by section 48 which runs thus: "All instruments duly registered under this Act and relating to any moveable or immoveable property, shall take effect against any oral agreement or declaration relating to the same property."

The next Registration Act was Act VIII of 1871 which was succeeded by Act III of 1877, or the present Registration Act. The sections with which we are concerned are the same in both Acts. Section 17 of the Act is virtually the same as before. It now includes "Leases of immoveable property from year to year or reserving a yearly rent" and also, among other things, "authority to adopt a son" when given independently of a will. Section 18 is much the same as before, and so is section 47. Section 48 is reproduced with this addition, "unless where the agreement or declaration has been accompanied or followed by delivery of possession." Section 49 is practically to the same effect as before. Here is section 50, "Every document of the kind mentioned in clauses (*a*), (*b*), (*c*), (*d*) of section 17, and clauses (*a*), (*b*) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, * * whether such unregistered document be of the same nature as the registered document or not." The object of the introduction of clauses (*a*), (*b*), (*c*), (*d*) in section 50 which were absent from the corresponding section of the older Act is probably to make it clear that a registered document of the class of documents of which Registration is compulsory will also prevail against an unregistered document of a class of which Registration is optional. Note the argument in Nalappa's case:[1] "Under the former law in this country there was this anomaly, that a document, the registration of which was optional, could be superseded by a subsequent document for less than 100 Rs.; but not by one for more than 100 Rs.: section 50 was enacted to cure this anomaly."

Note, the observation of PONTIFEX, J.,[2] as to the characteristic difference between a document of which registration is compulsory and one of which registration is optional: "LORD ELDON in *Davis* v. *Earl of Strathmore*[3] has pointed out the distinction between an Act of Parliament denying legal effect to certain instruments, and declaring them void to all intents and purposes;"—as is the case with documents enumerated in section 17 of our Registration Act by reason of the provision of section 49—"and a Court of Equity collecting from the more extensive words the inference that the equitable as well as the legal jurisdiction was intended to be prohibited: this distinction, I think, exists in the construction which ought to be placed on the Registration Acts with respect to instruments affecting property of less value than Rs. 100, and

[1] I. L. R. 5 Mad 74. [2] I. L. R. 5 Cal. 348 [3] 16 Ves 428

instruments purporting to affect property of the value of Rs 100 and upwards; in the latter case, the instrument, if unregistered, is void to all intents and purposes, and the equitable jurisdiction of the Court is ousted; in the former case, the instrument, although unregistered, is not void to all intents and purposes, and the equitable jurisdiction of the Court remains unaffected." The effect of section 50, therefore, in respect of some of the documents of which the registration is optional, is this, that whereas an unregistered deed relating to property below the value of 100 Rs. is, as against the vendors or mortgagors, perfectly valid and effectual, it is liable to be postponed in favour of a subsequent purchaser or mortgagee of the same property if his document is registered.

Note, also, the provision in section 48 in respect of "oral agreements or declarations." PONTIFEX, J., thus observes: "The insertion of the words relating to possession, in section 48 appears to me, therefore, to have been mainly intended as a declaration of the law limiting the operation of oral alienation; it was in effect equivalent to saying that, although the Registration Acts are not intended to interfere with oral alienation, which, from the nature of the case, cannot be registered; yet the only oral alienation of which the law can take notice, in competition with registered instruments, are those which are properly established by evidence of possession; the insertion of the words relating to possession, in fact rather detracts from, than adds to, the security of oral alienations, because unless the oral alienee was in possession, the courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed." I have quoted these observations from Fuzludeen Khan's case.[1] And the learned Judge there interpreted section 50 of the Act upon the basis of *Jolland* v. *Stainbridge*.[2] These are his words: "I think, therefore, that we ought to interpret section 50 as intended to apply to the case of two innocent purchasers, giving the preference to the one who has taken the greater precaution to secure his title, but not as intended to apply to the case of a subsequent purchaser, who registers, but who at the date of his purchase, had *actual notice* of a prior unregistered purchase; for otherwise, in this latter case, the subsequent purchaser with *full notice* would, by registration, be enabled wilfully to defraud a prior purchaser of the property, which he had himself purchased, and which had been properly and legally conveyed to him." It was also thrown out in the case that possession in many instances is a material fact in the evidence of notice or no notice.[3]

In the same year, 1879, Waman Ramchandra's case came before the Full Bench of the Bombay High Court. The judgment though it dealt with section 48 proceeded very much on the same lines as the prior judgment of PONTIFEX, J. In the first place WESTROPP, C. J., stated the un-

[1] I. L. R. 5 Cal. 336 (1879) [2] 3 Ves. 485. [3] I. L. R. 5 Cal. 350.

disputed proposition that registration could not confer validity upon an instrument which was found to be *ultra vires*, or illegal or fraudulent. Then as to the effect of an oral agreement unaccompanied by possession in competition with a registered document, the learned Chief Justice was of opinion that the provision of section 48 could not be properly applied to a registered document of sale which had been given, accepted and registered with full notice of a prior oral agreement of sale. "The reason for the exception made by the section in favour of an oral agreement accompanied by possession is, that by such possession," in the language of the judgment, "the parties who rely on a subsequent registered deed, had or might, if they had been reasonably vigilant, have had, previously to entering into their contract with the vendor and to their taking a conveyance, notice by the fact of such possession, that there was some prior claim to the property." In the view of the judgment a mere oral agreement or declaration would prevail against a registered document if there was evidence to show that the holder of the document had notice of the prior agreement. The learned Chief Justice chiefly relied on the *Agra Bank* v. *Barry*.[1] Note the words of LORD SELBORNE in that case. "It would I think, my Lords, be quite inconsistent with the policy of the Registry Act (5 Anne c. 2) which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests; but it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered interests when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent."

Then followed the Full Bench decision of the Calcutta High Court in *Narain Chunder Chuckerbutty* v. *Dataram Roy*.[2] The leading proposition there laid down was with reference to section 50. It was to the effect that under section 50, the title of a prior unregistered purchaser will fail as against a subsequent registered purchaser for value. It was also observed there by PONTIFEX, J., that "to lay down that possession alone was in all cases sufficient notice" would be to state the proposition too broadly. The same learned Judge threw out on the authority of the *Agra Bank* v. *Barry*, that "the only case in which the title of the prior unregistered purchaser can prevail against the subsequent registered purchaser for value is when the latter takes no notice of the title of the former." Note, also, the observation of the Court that "delivery of possession is not under the Hindu law essential to complete the title of a purchaser for value."

[1] L. R. 7 Eng. and Ir. App. 135. 147.

[2] I. L. R. 8 Cal. 597 (1882.)

In the Full Bench case of Sobhagchand Gulabchand,[1] the general rule in the Bombay Presidency was stated to be "that amongst Hindus, possession is necessary in order to perfect a transfer of immoveable property by mortgage or deed of sale as against subsequent incumbrancers or purchasers; the main ground of the rule is that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession."

These are the principal decisions on the construction of sections 48 and 50 of the Registration Act and it will be observed that the principle enunciated in all the cases is that on the analogy of the English decisions on the subject, the title of a prior unregistered purchaser will prevail against a subsequent registered purchaser for value with notice of the prior transaction whether the instrument be compulsorily or optionally registrable. It should be borne in mind, also, that one of the main objects of the Registration Act is to insist upon every purchaser, no matter what the value of the property may be, to secure his title, as far as possible, by registration, and to enable Courts of Justice to get rid, as far as possible, of the vexatious and somewhat unsatisfactory evidence of notice. Note, therefore, the important case of *Nallappa* v. *Ibram.*[2] That was a suit to recover from the land hypothecated a sum of money due upon a hypothecation bond. The bond was optionally registrable and not registered. Subsequently to that transaction the mortgagor sold the same land to the defendants for Rs. 50, the deed of sale although optionally registrable was, however, registered. It was found by the lower appellate Court that the defendants purchased the land with full notice of the incumbrance, and that Court accordingly gave a decree to the plaintiffs. On second appeal the High Court of Madras, (TURNER C. J. and INNES, J.) were clearly of opinion that *the effect of Registration was altogether independent of notice*, and reversed the decree. "In *Fazludeen Khan* v. *Fakir Mahomed Khan*," in the words of the Court, "the Judge of the High Court from whose judgment that case came on appeal, based his judgment on the view that the vendor having by the first sale parted with all interests in the property, had nothing to sell and sold nothing to the subsequent registered purchaser; but the appellate Court held that the first sale was, according to the intention of the Legislature, subject to the risk of the title of the vendor being displaced by a subsequent innocent purchaser without notice, whose conveyance was duly registered. We agree in this view except that, we think, the effect of registration is altogether independent of notice. In the case just referred to, the question of the effect of notice did not arise, and therefore the case is hardly an authority upon the point. * * Act XIX of 1843 did away with the doctrine of notice which has never since been expressly revived. There is nothing about notice to be found in the Acts of

[1] I. L. R. 6 Bom. 193 (1882).

[2] I. L. R. 5 Mad. 73 (1882).

1864, 1866, 1871, or 1877. Have we any right to import this doctrine? Were we to do so, notice, it cannot be doubted, would be set up in almost every case, and the Act would be rendered to a great extent inoperative. The plain words of the Act are:—"shall if duly registered take effect, as regards the property comprised therein, against every unregistered document relating to the same property."—The words are used without any qualification and, we think, we should not be giving effect to the Act if we treated the circumstance of the defendants having notice (as is found) of the plaintiff's unregistered document as one which bars the operation of section 50 of the Registration Act."

As an illustration of section 47, note the case of Santaya Mangarsaya.[1] There the plaintiff purchased certain land by a deed dated the 8th April 1879. The deed was registered on the 26th August of the same year. The defendant purchased the same land by a deed dated the 14th June 1879. It was registered on the same day. That deed recited that the land was in the possession of the plaintiff as tenant. Both the deeds were optionally registrable; the District Judge agreed with the Court of first instance in rejecting the plaintiff's claim on the ground that the defendant's deed was registered before the plaintiff's deed. On second appeal, SARGENT, C. J., said—"As both deeds of sale were registered according to law, they would operate from their respective dates of execution," and reversed the decree.

It should be borne in mind that an oral transfer without delivery of possession will by a necessary implication from the language of section 48 of the Registration Act, effectually pass the property as against the vendor and all persons claiming under him otherwise than by a duly registered conveyance.[2]

The Transfer of property Act now renders Registration obligatory in every case of sale of immoveable property with this exception that if the property be of a tangible nature and a value of less than 100 rupees sale may in the alternative be made by delivery of possession. In the Full Bench case of Narain Chunder Chuckerbutty *v.* Dataram Roy, GARTH, C. J., was of opinion that the effect of Section 54 of the Transfer of Property Act was virtually to abolish optional Registration.[3]

It has already been observed that a voluntary transfer is liable to be set aside in favour of a creditor. It may also be that a person has purchased immoveable property under a document of which the registration is optional, and is therefore likely to be postponed in favour of a person who happens to have purchased the same property under a registered document. It should be remembered, also, that although an innocent volunteer will not be permitted to better his position as against a person who has a higher claim to the property, the law will take care that he should not suffer any positive loss. In view of

[1] I. L. R. 8 Bombay 182. [2] I. L. R. 8 Cal. 610. [3] I. L. R. 8 Cal. 612.

these circumstances, it would appear, that Act XI of 1855 was enacted. This is the language of the Act: "If any person shall erect any building or make an improvement upon any lands held by him *bonâ fide* in the belief that he had an estate in fee simple or other absolute estate, and such person, his heirs, and assigns or his or their undertenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs and assigns shall be entitled either to have the value of the building or improvement so erected or made during such holding in such belief, estimated and paid or secured to him or them, or, at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof irrespective of the value of such building or improvement; provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction." It is apparent from the words of the Act that the provision was intended for the protection of persons to whom the English law is applicable. The Transfer of Property Act now provides by section 51 that "where the transferee of immoveable property makes any improvement on the property believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement; the amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction; when, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

In an old English case, known as Thomas Thorne's case, where a transferee for value was liable to be supplanted by reason of his inferior title, the Court directed the person claiming under a superior title to pay the former his purchase money with interest together with the money laid out by him in building or repairing.[1] In *Mulhallen* v. *Marum*,[2] where a person occupying a sort of fiduciary postion towards another had obtained a perpetual lease from the latter shortly after he had come of age, the Court set aside the lease; but having regard to the fact that the plaintiff had made considerable delay in filing his bill allowed the defendant the expenses he had incurred on account of substantial and lasting improvements.[3]

[1] Finch's Reports 38 (1673).

[2] 3 Drury and Warren, 317.

[3] See the case of *Anandrao* v. *Ravji*, 2 Bom., H. C. R., 229

APPENDIX.

THE

TRANSFER OF PROPERTY ACT, 1882

BEING

ACT IV OF 1882.

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THE SCHEDULE—ENACTMENTS REPEALED.

ACT No. IV OF 1882

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the* 17*th February*, 1882.)

An Act to amend the law relating to the Transfer of Property by act of Parties.

Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. This Act may be called "The Transfer of Property Act, 1882":

It shall come into force on the first day of July, 1882;

It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend this Act to the whole or any specified part of the territories under its administration.

And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections forty-one, fifty-four, paragraphs two and three, fifty-nine, sixty-nine, one hundred and seven and one hundred and twenty-three.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(*a*) the provisions of any enactment not hereby expressly repealed:

(*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force:

(*c*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability: or

(*d*) save as provided by section fifty-seven and chapter four of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction: and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

3 In this Act, unless there is something repugnant in the subject or context,—

"immoveable property" does not include standing timber, growing crops or grass:

"instrument" means a non-testamentary instrument:

"registered" means registered in British India under the law for the time being in force regulating the registration of documents:

'attached to the earth" means—

(*a*) rooted in the earth, as in the case of trees and shrubs;

(*b*) imbedded in the earth, as in the case of walls or buildings; or

(*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

and a person is said to have "notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A)—Transfer of Property, whether moveable or immoveable.

5 In the following sections "transfer of property" means an act by which a living person conveys property in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:

(*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(*b*) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(*c*) An easement cannot be transferred apart from the dominant heritage.

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(*e*) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(*f*) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(*g*) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with, or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the

income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(*a*) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(*b*) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void

(*c*) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(*d*) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(*a*) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(*b*) A transfers Rs 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(*a*) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(*b*) A transfers property to his wife; but in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen

such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

31. Subject to the provisions of section twelve, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(*a*) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(*b*) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Election.

35. Where a person professes to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making of fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of C and worth Rs 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be served and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(*a*) A sells to B, C and D a house situate in a village and leases to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(*b*) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this

work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

(B)—Transfer of Immoveable Property.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindú widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

39 Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Illustration.

A, a Hindú, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultánpur She has no claim on the villages transferred to C

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultánpar to B. While the contract is still in force he sells Sultánpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease

subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43 Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindú who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(*a*) A, owing a moiety, and B and C, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(*b*) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs 1,000. A's life-interest is ascertained to be worth Rs. 600 the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, take effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultánpur, transfer a two-annas share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

49 Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

CHAPTER III.

Of Sales of Immoveable Property.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and promised.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

(*a*) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(*b*) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(*c*) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(*d*) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;

(*f*) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(*g*) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property if due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

provided that, where the sale is made by a person in a fiduciary character. he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

provided that (*a*), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (*b*), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

(*a*) to the rents and profits of the property till the ownership thereof passes to the buyer;

(*b*) where the owership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(*b*) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(*c*) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(*d*) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(*a*) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of the property, and to the rents and profits thereof:

(*b*) unless he has improperly declined to accept delivery of the property, to a charge on

the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (*a*), and paragraph (5), clause (*a*), is fraudulent.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Discharge of Incumbrances on Sale.

57. (*a*) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court,

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(*c*) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof

(*d*) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(*e*) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV.

Of Mortgages of Immoveable Property and Charges.

58. (*a*) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(*b*) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(*c*) Where the mortgagor ostensibly sells the mortgaged property—

on condition that in default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller.

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(*d*) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money; or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee

(*e*) Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karáchi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Rights and Liabilities of a Mortgagor.

60. At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (*a*) to deliver the mortgage-deed, if any, to the mortgagor, (*b*) where the mortgagee is in possession of mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

61. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seek to redeem

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z A may institute a suit for the redemption of the mortgage on Z alone,

62. In the case of an usufructuary mortgage, the mortgagor has a right to recover possession of the property—

(*a*) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;

(*b*) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in court as hereinafter provided.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

64. Where mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,

(*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(*b*) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(*d*) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (*c*), or in clause (*d*), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

(a) where the mortgagor binds himself to repay the same:

(b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor:

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Budhist;

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karáchí or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for the three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Budhist.

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations.

(*a*) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(*b*) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

72 When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

(*a*) for the due management of the property and the collection of the rents and profits thereof;

(*b*) for its preservation from destruction, forfeiture or sale;

(*c*) for supporting the mortgagor's title to the property;

(*d*) for making his own title thereto good against the mortgagor; and

(*e*) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and subject to the provisions of the law for the time being in force regulating the registration of documents, the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees, as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

76. When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(*b*) he must use his best endeavours to collect the rents and profits thereof;

(*c*) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold;

(*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal money;

(*e*) he must not commit any act which is destructive or permanently injurious to the property;

(*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;

(*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(*h*) his receipts from the morgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor:

(*i*) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court, as the case may be.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

77. Nothing in section seventy-six, clauses (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration.

A mortgages Sultánpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultánpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B. & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section seventy-nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Marshalling and Contribution.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section eighty-one to the claim of the second mortgagee.

Deposit in Court.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court, as the case may be.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Suits for Foreclosure, Sale or Redemption.

85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

Foreclosure and Sale.

86. In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into court the amount so due, on a day within six months from the date of declaring in court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

87. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property,

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, schedule IV, No. 129, for the words "Final decree" the words "Decree absolute" shall be substituted.

88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

89. If in any case under section eighty-eight the defendant pays to the plaintiff or into court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished.

90. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

Redemption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property :—

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property;

(*b*) any person having any interest in or charge upon the right to redeem the property;

(*c*) any surety for the payment of the mortgage-debt or any part thereof;

(*d*) the guardian of the property of a minor mortgagor on behalf of such minor;

(*e*) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;

(*f*) the judgment-creditor of the mortgagor, when he has obtained execution by attchment of the mortgagor's interest in the property;

(*g*) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into court the amount so due on a day within six months from the date of declaring in court the amount so due to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

93. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming

through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished ;

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section ninety-two for payment to the defendant.

94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Sale of Property subject to prior Mortgage.

96 If any property the sale of which is directed under this chapter is subject to a prior mortgage, the court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

97. Such proceeds shall be brought into court and applied as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

Anomalous Mortgages.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Attachment of Mortgaged Property.

99. Where a mortgage in execution of a decree for the satisfaction of any claim, whether arising under the morgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

Charges.

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such

property, and the provisions of sections eighty-one and eighty-two and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of court by, any person incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this chapter.

CHAPTER V.

Of Leases of Immoveable Property.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound

by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immoveable property may be made either by an instrument or by oral agreement

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

A.—Rights and Liabilities of the Lessor.

(*a*) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(*b*) the lessor is bound on the lessee's request to put him in possession of the property :

(*c*) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

(*d*) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(*e*) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(*f*) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(*g*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(*h*) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth : provided he leaves the property in the state in which he received it :

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(*j*) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor

and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(*p*) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

111. A lease of immoveable property determines—

(*a*) by efflux of the time limited thereby:

(*b*) where such time is limited conditionally on the happening of some event—by the happening of such event:

(*c*) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(*d*) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:

(*e*) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:

(*f*) by implied surrender:

(*g*) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease:

(*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease This is an implied surrender of the former lease, and such lease determines thereupon.

112. A forfeiture under section one hundred and eleven, clause (*g*), is waived by acceptance of rent which has become due since the forfeiture, or by dstress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. A notice given under section one hundred and eleven, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations.

(*a*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(*b*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annulls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section one hundred and fourteen.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

Illustrations.

(*a*) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(*b*) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

Of Exchanges.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or the return of the thing transferred by him.

120. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

Of Gifts.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

124. A gift comprising both existing and future property is void as to the latter.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(*a*) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(*b*) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation he retains the property given, he becomes so bound.

Illustrations.

(*a*) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(*b*) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be left for,

gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

CHAPTER VIII.

Of Transfers of Actionable Claims.

130. A claim which the civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.

131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

Illustration.

A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

132. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

133. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Nothing in the former part of this section applies—

(*a*) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

(*b*) where it is made to a creditor in payment of what is due to him;

(*c*) where it is made to the possessor of a property subject to the actionable claim;

(*d*) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

136 No judge, pleader, mukhtár, clerk, bailiff or other officer connected with Courts of justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Illustration.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud The debenture is invalid in the hands of B.

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.

139. Nothing in this chapter applies to negotiable instruments.

THE SCHEDULE.

(a) STATUTES.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10 ...	Uses	The whole.
13 Eliz., c. 5	Fraudulent conveyances ...	The whole.
27 Eliz., c. 4	Fraudulent conveyances ...	The whole.
4 Wm. & Mary, c. 16. ...	Clandestine mortgages ...	The whole.

(b) ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land ...	Section 17.
XI of 1855	Mesne profits and improvements...	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866... ...	Indian Trustee Act	Section 31.
IV of 1872	Panjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877	Specific Relief	In sections 35 and 36, the words "in writing."

(c) REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation, I of 1798	Conditional sales	The whole Regulation.
Bengal Regulation, XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation, V of 1827,	Acknowledgment of debts: Interest: Mortgagees in possession.	Section 15.

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